FILE COPY

Nos. 23, 24 and 34

IN THE

Supreme Court of the United States

October Term, 1947

FEDERAL TRADE COMMISSION,

Petitioner,

vs.

THE CEMENT INSTITUTE, *et al.*; AETNA PORTLAND CEMENT COMPANY, *et al.*; BLAINE S. SMITH, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPENDIX A TO BRIEF OF RESPONDENTS

A TOPICAL DIGEST OF THE EVIDENCE

VOLUME I

Part I—Basic Facts About Cement, Its Manufacture and Markets

Part II—Cement Pricing—Commercial

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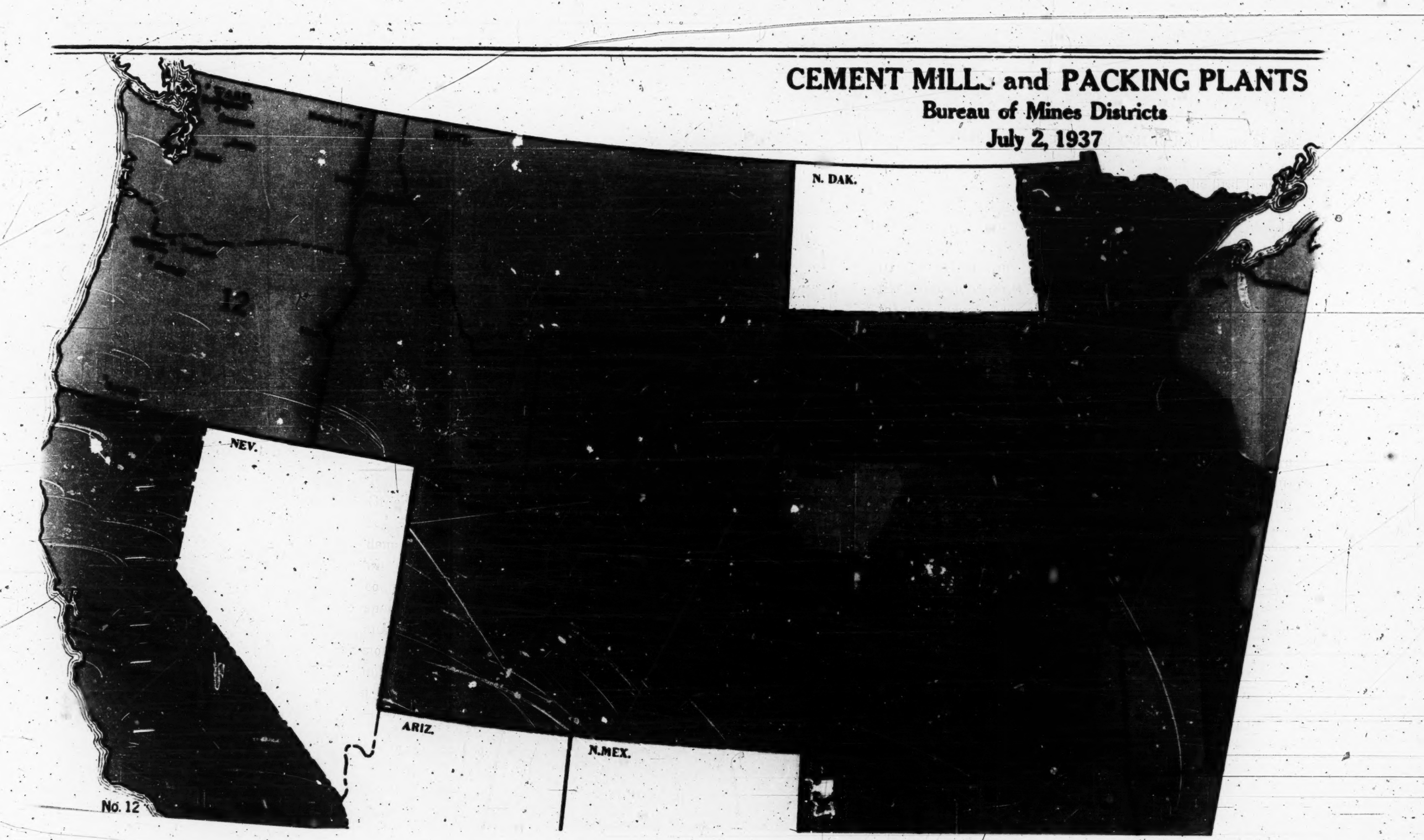
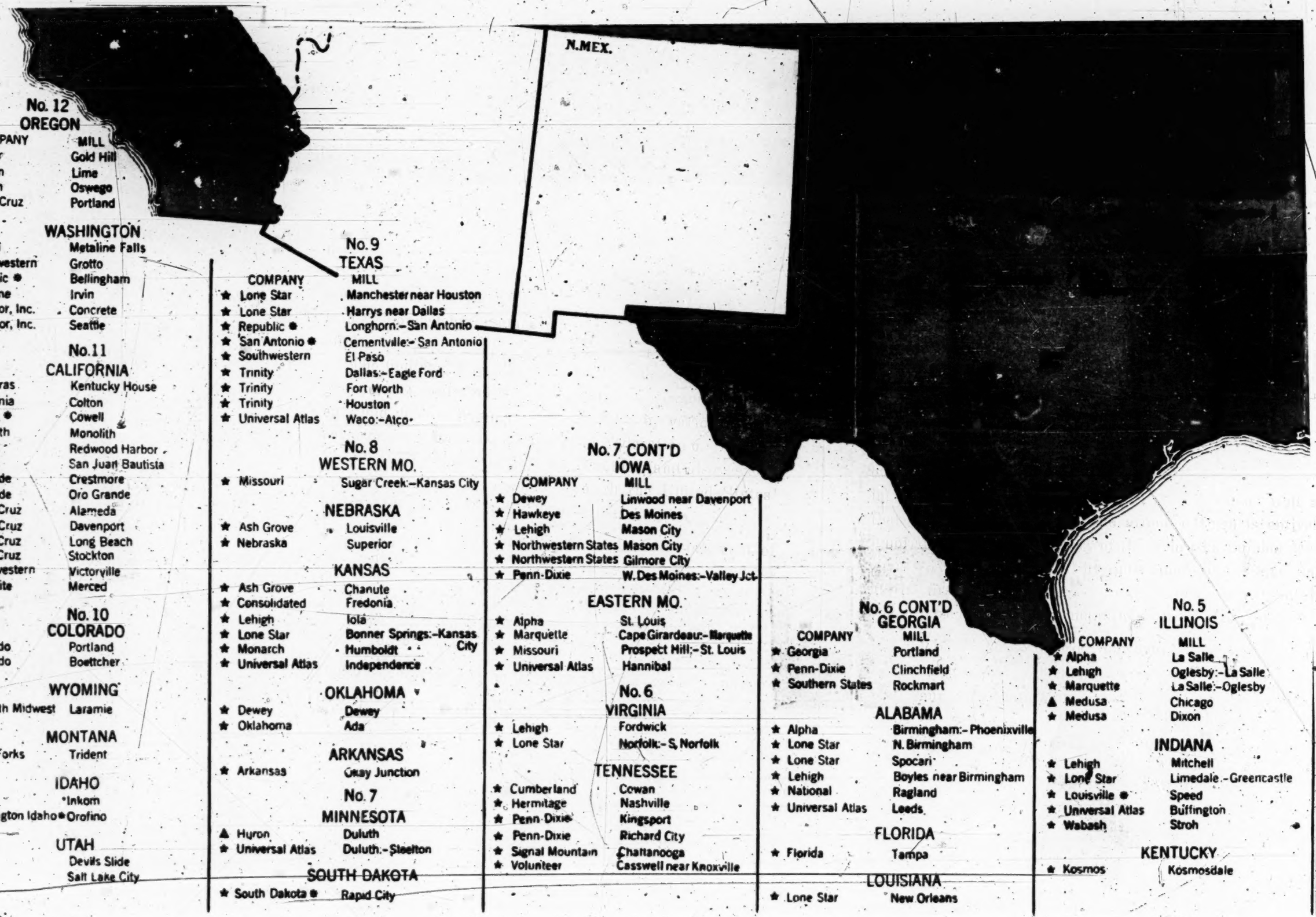
CEMENT MILLS and PACKING PLANTS

Bureau of Mines Districts

July 2, 1937



VT.
N.H.
MASS.
CONN.
R.I.
N.C.
S.C.
MISS.
LEGEND:-
Mill
Packing Plant
Non Respondent
Product Marketed by Company named below
City, Town, Village
No. 3 CONT'D
W. VIRGINIA
Alpha
Green Bag, W. Va.
Standard Lime
Manheim
Kenova
Martinsburg
No. 2
NEW YORK
Alpha
Alpha
Federal
Glens Falls
Great Lakes
Lehigh
Huron
Cementon-Catskill
Jamesville
Buffalo-Hamburg, Lackawanna
Glens Falls
Buffalo
Buffalo



No. 12
OREGON

COMPANY	MILL
★ Beaver	Gold Hill
★ Oregon	Lime
★ Oregon	Oswego
▲ Santa Cruz	Portland

WASHINGTON

★ Lehigh	Metaline Falls
★ Northwestern	Grotto
★ Olympic ●	Bellingham
★ Spokane	Irvin
★ Superior, Inc.	Concrete
★ Superior, Inc.	Seattle

No. 11
CALIFORNIA

★ Calaveras	Kentucky House
★ California	Colton
★ Cowell ●	Cowell
★ Monolith	Monolith
★ Pacific	Redwood Harbor
★ Pacific	San Juan Bautista
★ Riverside	Crestmore
★ Riverside	Oro Grande
▲ Santa Cruz	Alameda
★ Santa Cruz	Davenport
▲ Santa Cruz	Long Beach
▲ Santa Cruz	Stockton
★ Southwestern	Victorville
★ Yosemite	Merced

No. 10
COLORADO

★ Colorado	Portland
★ Colorado	Boettcher

WYOMING

★ Monolith Midwest	Laramie

MONTANA

★ Three Forks	Trident

IDAHO

★ Idaho	*Inkom
★ Washington Idaho ●	Orofino

UTAH

★ Union	Devils Slide
★ Utah	Salt Lake City

No. 9
TEXAS

COMPANY	MILL
★ Lone Star	Manchester near Houston
★ Lone Star	Harrys near Dallas
★ Republic ●	Longhorn:–San Antonio
★ San Antonio ●	Cementville:–San Antonio
★ Southwestern	El Paso
★ Trinity	Dallas:–Eagle Ford
★ Trinity	Fort Worth
★ Trinity	Houston
★ Universal Atlas	Waco:–Atco

No. 8
WESTERN MO.

★ Missouri	Sugar Creek:–Kansas City

NEBRASKA

★ Ash Grove	Louisville
★ Nebraska	Superior

KANSAS

★ Ash Grove	Chanute
★ Consolidated	Fredonia
★ Lehigh	Iola
★ Lone Star	Bonner Springs:–Kansas City
★ Monarch	Humboldt
★ Universal Atlas	Independence

OKLAHOMA

★ Dewey	Dewey
★ Oklahoma	Ada

ARKANSAS

★ Arkansas	Gray Junction

No. 7
MINNESOTA

▲ Huron	Duluth
★ Universal Atlas	Duluth:–Steelton

SOUTH DAKOTA

★ South Dakota ●	Rapid City

No. 7 CONT'D
IOWA

COMPANY	MILL
★ Dewey	Linwood near Davenport
★ Hawkeye	Des Moines
★ Lehigh	Mason City
★ Northwestern States	Mason City
★ Northwestern States	Gilmore City
★ Penn-Dixie	W. Des Moines:–Valley Jct.

EASTERN MO.

★ Alpha	St. Louis
★ Marquette	Cape Girardeau:–Marquette
★ Missouri	Prospect Hill:–St. Louis
★ Universal Atlas	Hannibal

No. 6
VIRGINIA

★ Lehigh	Fordwick
★ Lone Star	Norfolk:–S. Norfolk

TENNESSEE

★ Cumberland	Cowan
★ Hermitage	Nashville
★ Penn-Dixie	Kingsport
★ Penn-Dixie	Richard City
★ Signal Mountain	Chattanooga
★ Volunteer	Casswell near Knoxville

No. 6 CONT'D
GEORGIA

COMPANY	MILL
★ Georgia	Portland
★ Penn-Dixie	Clinchfield
★ Southern States	Rockmart

ALABAMA

★ Alpha	Birmingham:–Phoenixville
★ Lone Star	N. Birmingham
★ Lone Star	Spocari
★ Lehigh	Boyles near Birmingham
★ National	Ragland
★ Universal Atlas	Leeds

FLORIDA

★ Florida	Tampa

LOUISIANA

★ Lone Star	New Orleans

No. 5
ILLINOIS

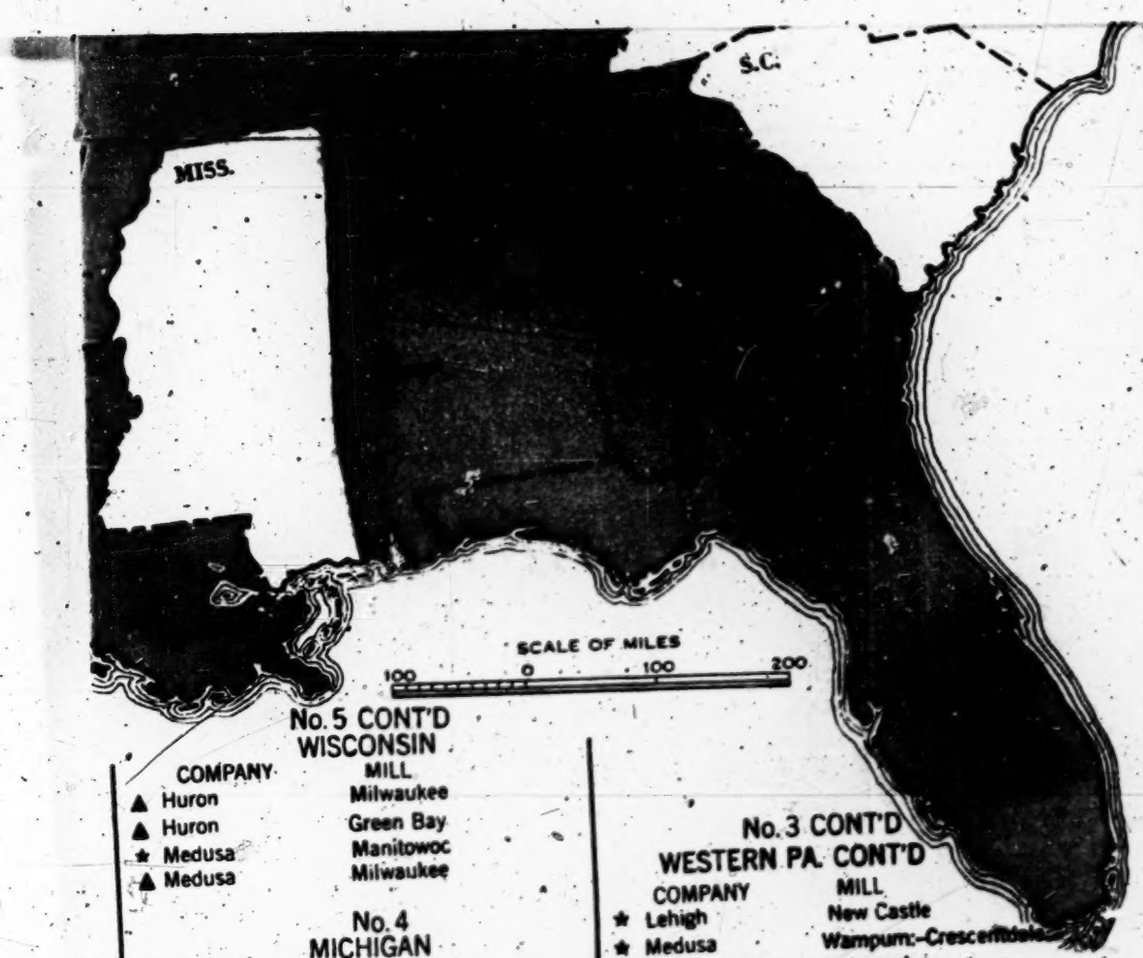
COMPANY	MILL
★ Alpha	La Salle
★ Lehigh	Oglesby:–La Salle
★ Marquette	La Salle:–Oglesby
▲ Medusa	Chicago
★ Medusa	Dixon

INDIANA

★ Lehigh	Mitchell
★ Lone Star	Limedale–Greencastle
★ Louisville ●	Speed
★ Universal Atlas	Buffington
★ Wabash	Stroh

KENTUCKY

★ Kosmos	Kosmosdale



No. 5 CONT'D WISCONSIN

COMPANY	MILL
▲ Huron	Milwaukee
▲ Huron	Green Bay
★ Medusa	Manitowoc
▲ Medusa	Milwaukee

No. 4 MICHIGAN

★ Aetna	Bay City
★ Consolidated	Cement City
★ Ford	Dearborn:-Fordson
★ Huron	Alpena
▲ Huron	Detroit
▲ Huron	Muskegon
▲ Huron	Saginaw
★ Huron	Wyandotte
▲ Medusa	Holland
★ Peerless	Detroit
★ Peerless	Port Huron
★ Petosky	Petoskey:-Lamson
★ Wolverine	Quincy
★ Wolverine	Coldwater

No. 3 WESTERN PA.

★ Bessemer	Bessemer:-Walford
★ Green Bag, Pa. Formerly Basic Products Co.	Neville Island:-Pittsburgh

No. 3 CONT'D WESTERN PA. CONT'D

COMPANY	MILL
★ Lehigh	New Castle
★ Medusa	Wampum:-Crescentdale
★ Universal Atlas	Upiversal
★ West Penn	W. Winfield:-Butler

OHIO

★ Alpha	Ironton
★ Castalia	Castalia
★ Diamond	Middlebranch
▲ Great Lakes † Lehigh	Cleveland
▲ Huron	Cleveland
▲ Huron	Toledo
★ Medusa	Baybridge:-Sandusky
★ Medusa	Silica:-Toledo
★ Pittsburgh	Fultonham:-E. Fultonham, Zanesville
★ Southwestern	Osborn
★ Standard	Painesville
★ Superior:- Formerly Wellston Iron Furnace Co.	Superior
★ Wabash	Osborn

★ Federal	Buffalo:-Hamburg, Lackawanna
★ Glens Falls	Glens Falls
★ Great Lakes † Lehigh	Buffalo
▲ Huron	Buffalo
▲ Huron	Oswego
★ Lone Star	Hudson:-Hudson Upper
★ Lehigh	Alsen
★ North American	Howes Cave
★ North American	Catskill
★ Penn-Dixie	Portland Point
★ Universal Atlas	Hudson

MAINE

★ Lawrence	Thomaston:- Rockland

No. 1 DIST. of COLUMBIA

▲ Lone Star	Washington

EASTERN PA.

★ Allentown	Evansville
★ Alpha	Martins Creek
★ Coplay	Coplay
★ Coplay	Saylor
★ Giant	Egypt
★ Giant	Lesley
★ Hercules	Stockertown
★ Keystone	Bath
★ Lawrence	Siegfried
★ Lehigh	Sandts Eddy
★ Lehigh	Ormrod
★ Lehigh	Fogelsville
★ Lone Star	Nazareth
★ Medusa	York
★ National Portland	Brodhead
★ Nazareth	Nazareth
★ Penn-Dixie	Nazareth
★ Penn-Dixie	Penn Allen
★ Penn-Dixie	Bath
★ Universal Atlas	Northampton
★ Valley Forge † Allentown	W. Conshohocken:-Swedeland
★ Whitehall	Northampton:- Cementon

NEW JERSEY

★ Edison	New Village:- Stewartville
★ Vulcanite	Vulcanite:-Phillipsburg

MARYLAND

★ Lehigh	Union Bridge
★ North American	Security

Drawn by J.H.N. Muirhead, P.E. 6357 N.Y.

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Corrections to Volume I

Page 27, fn. 5—Last line should read "agencies, Part IV, *infra*, pp. 982-83".

" 35, fn. 1—Part XII in last line should read Part XIV.

" 200, line 31—Insert pp. 3096-3104 after Part XX.

" 260, fn. 15—Insert pp. 716-18 after Part IV.

" 273, fn. 1—Insert pp. 716-18, 879-80 after Part IV.

" 276, fn. 1—Insert pp. 716-18, 879-80 after Part IV.

" 576, fn. 8—Last line should read *supra*, fn. 11-14.

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EXPLANATION OF SYMBOLS

Symbol	
Tr.	Transcript of Record
R.	Printed Record
(C)	Commission's Witness
(R)	Respondent's Witness
(O. P.)	Offer of Proof
Com. Ex.	Commission's Exhibit
Resp. Ex.	Respondent's Exhibit
Fdgs.	Findings as to the Facts

Mill or Plant:	These words are used interchangeably to describe a unit equipped to manufacture, pack and ship Portland cement.
Packing Plant or Silo:	These words are used interchangeably to describe a unit equipped to receive from a mill or plant cement clinker for grinding and sacking or cement in bulk for sacking.
Warehouse:	When operated by a manufacturer it handles sacked cement received from a mill or plant for distribution to the trade.

FOREWORD

All evidence quoted in the Findings is printed in this Digest in italics following the words in bold faced type:

[Italicized part quoted in Fdgs. Par.]

Error has been assigned to the action of the Commission in receiving in evidence or giving any consideration or weight in making its Findings to certain evidence, on various grounds argued in the brief. These assignments of error are addressed to all of the evidence digested in Parts III, IX and XII and to evidence in other parts enclosed in bold brackets, thus: [ ]

RESPONDENTS BEFORE THE FEDERAL TRADE COMMISSION

The complaint herein was issued on July 2, 1937 against The Cement Institute; its officers and trustees and 75 cement producers operating on that date 143 mills and 19 silos or packing plants. These same producers had on earlier dates ceased to operate 7 mills, of which three have been dismantled.

On the same date there were also 11 non-respondent producers operating 11 mills.

All of the foregoing are listed below:

The Cement Institute:	hereinafter frequently called the Institute.

At the time of the issuance of the complaint in this proceeding its officers and trustees were as follows (Fdgs. Par. One (a)-(d)):

President and Trustee	Smith W. Storey
Vice President and Trustee	Frank G. McKelvey
" " "	Blaine S. Smith
Treasurer	Charles F. Conn
Trustees:	Harold M. Scott, John J. Porter, Harry F. Jennings, A. J. Rooney, B. H. Rader, M. C. Monday, C. B. Condon, Chester A. Brooke, William R. Blair, Charles Boettcher, Ernest E. Duque, Edwin P. Lucas, Charles L. Hogan, John B. John, V. N. Roadstrum and Joseph S. Young
Secretary and General Manager:	George H. Reiter

List of Producing Respondents

Footnotes to the names of Aetna, Alpha, Lehigh, Medusa and Northwestern States correct Fdgs., Par. One, as to the plants of these companies, otherwise Fdgs., Par. One on these points are accepted. Asterisks (*) indicate the companies that are petitioners in Cases Nos. 8360, 8361 and 8410.

Respondent	Hereinafter Called	Location of Mills and Silos
*Aetna Portland Cement Co.	Aetna	Bay City, Mich. Fenton, Mich.[1]
*Alpha Portland Cement Co.	Alpha	Martins Creek, Pa. Jamesville, N. Y. Cementon (Catskill), N. Y. Manheim, W. Va. LaSalle, Ill. Ironton, Ohio St. Louis, Mo. Birmingham (Phoenixville), Ala. Bellevue, Mich.[2]
*Arkansas Portland Cement Co.	Arkansas	Okay Jct., Ark.
*Ash Grove Lime & Portland Cement Co.	Ash Grove	Chanute, Kan. Louisville, Neb.
*Beaver Portland Cement Co.	Beaver	Gold Hill, Ore.

[1] Cree, former Sales Manager of Aetna, stated that the mill at Fenton was obsolete and Resp. Ex. 2405 shows the mill to be partially dismantled (C) Tr. 497.

[2] Magee, Vice President, Alpha, testified that the mill at Bellevue has been dismantled (R) Tr. 22632-34; Resp. Ex. 2405.

Respondent	Hereinafter Called	Location of Mills and Silos
*The Bessemer Limestone and Cement Co.	Bessemer	Bessemer (Walford), Pa.
*Calaveras Cement Co.	Calaveras	Kentucky House, Calif.
California Portland Cement Co.	California	Colton, Calif.
Castalia Portland Cement Co.	Castalia	Castalia, Ohio
*Colorado Portland Cement Co.	Colorado	Portland, Colo. Boettcher, Colo.
*Consolidated Cement Corp.	Consolidated	Fredonia, Kan. Cement City, Mich.
*Coplay Cement Manufacturing Co.	Coplay	Coplay, Pa. Saylor, Pa.
*Cumberland Portland Cement Co.	Cumberland	Cowan, Tenn.
*Dewey Portland Cement Co.	Dewey	Dewey, Okla. Linwood (Davenport), Iowa
*Diamond Portland Cement Co.	Diamond	Middle Branch, Ohio
*Edison Cement Corporation	Edison	New Village (Stewartsville), N. J.
*The Federal Portland Cement Co. Inc.	Federal	Buffalo (Hamburg, Lackawanna), N. Y.

Respondent	Hereinafter Called	Location of Mills and Silos
*Florida Portland Cement Co.	Florida	Tampa, Fla.
*Georgia Cement & Products Co.	Georgia	Portland, Ga.
*Giant Portland Cement Co.	Giant	Egypt, Pa. Lesley, Pa.
*Glens Falls Portland Cement Co.	Glens Falls	Glens Falls, N. Y.
*Great Lakes Portland Cement Corp.	Great Lakes	Buffalo, N. Y. Silo at: Cleveland
*Green Bag Cement Co. of Pennsylvania (formerly Davison, Coke & Iron Company)	Green Bag, Pa.	Neville Island (Pittsburgh), Pa.
*Green Bag Cement Co. of West Virginia (formerly Basic Products Company)	Green Bag, W. Va.	Kenova, W. Va.
*Hawkeye Portland Cement Co.	Hawkeye	Des Moines, Iowa
*Hercules Cement Corp.	Hercules	Stockertown, Pa.
*Hermitage Portland Cement Co.	Hermitage	Nashville, Tenn.
Huron Portland Cement Co.	Huron	Alpena, Mich. Wyandotte, Mich.

Respondent	Hereinafter Called	Location of Mills and Silos
Huron Portland Cement Co.	Huron	Silos at: Muskegon, Mich. Saginaw, Mich. Detroit, " Duluth, Minn. Milwaukee, Wis. Green Bay, " Toledo, Ohio Cleveland, Ohio Buffalo, N. Y. Oswego, N. Y.
*Idaho Portland Cement Co.	Idaho	Inkom, Idaho
*Keystone Portland Cement Co.	Keystone	Bath, Pa.
*Kosmos Portland Cement Co.	Kosmos	Kosmosdale, Ky.
*Lawrence Portland Cement Co.	Lawrence	Siegfried, Pa. Thomaston (Rockland), Maine
*Lehigh Portland Cement Co.	Lehigh	Sandt's Eddy, Pa. Ormrod, Pa. New Castle, Pa. Foglesville, Pa. Alsen, N. Y.[3] Union Bridge, Md.

[3] Bowen, Vice President, Lehigh, testified that Lehigh has plants at 12 locations which does not include the Great Lakes plant at Buffalo, with which Lehigh is affiliated (R) Tr. 26549, 26552.

The Commission failed to find that Lehigh operates a plant at Alsen, N. Y. The same witness testified that the Alsen plant was purchased at a receiver's sale in 1925. It was in very bad shape and has not operated for several years. It has been completely reconstructed and will be in full operation by 1940 (R) Tr. 26585.

Respondent	Hereinafter Called	Location of Mills and Silos
*Lehigh Portland Cement Co.	Lehigh	Mitchell, Ind. Oglesby, Ill. Fordwick, Va. Boyles (Birmingham), Ala. Mason City, Iowa Iola, Kansas Metaline Falls, Wash.
*Lone Star Cement Corp.	Lone Star	Hudson (Hudson Upper), N. Y. Nazareth, Pa. Norfolk (South Norfolk), Va. No. Birmingham, Ala. Spocari, (Demapolis) Ala. New Orleans, La. Manchester (Houston), Texas Harrys (Dallas), Texas Limedale (Greencastle), Ind. Bonner Spgs. (Kansas City), Kan. Silo at Washington, D. C.
Marquette Cement Manufacturing Co.	Marquette	La Salle (Oglesby), Ill. Cape Girardeau (Marquette), Mo.

Respondent	Hereinafter Called	Location of Mills and Silos
*Medusa Portland Cement Co.	Medusa	York, Pa. Wampum (Crescentdale), Pa. Bay Bridge (Sandusky), Ohio Silica (Toledo), Ohio Dixon, Ill. Newaygo, Mich.[4] Manitowoc, Wis. Silos at: Milwaukee, Wis. Chicago, Ill. Holland, Mich.
*Missouri Portland Cement Co.	Missouri	Prospect Hill (St. Louis), Mo. Sugar Creek (Kansas City), Mo.
*Monarch Cement Co.	Monarch	Humboldt, Kan.
Monolith Portland Cement Co.	Monolith Portland	Monolith, Calif.
Monolith Portland Midwest Co.	Monolith Midwest	Laramie, Wyo.
*National Cement Co.	National	Ragland, Ala.
*Nazareth Cement Co.	Nazareth	Nazareth, Pa.
*Nebraska Cement Co.	Nebraska	Superior, Neb.

[4] Medusa's mill at Newaygo is dismantled. Dawson, Vice President and Treasurer of Medusa (R) Tr. 40026; Resp. Ex. 2405.

Respondent	Hereinafter Called	Location of Mills and Silos
*North American Cement Corp.	North American	Howes Cave, N. Y. Catskill, N. Y. Security, Md.
Northwestern Portland Cement Co.	Northwestern Portland	Grotto, Wash.
*Northwestern States Portland Cement Co.	Northwestern States	Mason City, Iowa Gilmore City, Iowa[5]
*Oklahoma Portland Cement Co.	Oklahoma	Ada, Okla.
*Oregon Portland Cement Co.	Oregon	Lime, Oregon Oswego, Ore.
*Pacific Portland Cement Co.	Pacific	Redwood Harbor, Calif. San Juan Bautista, Calif.[6]
*Peerless Cement Corp.	Peerless	Detroit, Mich. Port Huron, Mich.
*Pennsylvania-Dixie Cement Corp.	Penn-Dixie	Kingsport, Tenn. Richard City, " Clinchfield, Ga. Nazareth, Pa. Penn Allen, Pa. Bath, Pa.

[5] The plant of Northwestern States located at Gilmore City, Iowa has not operated since 1930. MacDonald, B. A., Vice President (R) Tr. 36475.

[6] Not operated since 1930, A. H. Canvin, Secretary and Treasurer, and E. H. Downing, Director of Sales (R) Tr. 42836.

Respondent	Hereinafter Called	Location of Mills and Silos
*Pennsylvania Dixie Cement Corp.	Penn-Dixie	Portland Point, N. Y. West Des Moines (Valley Jct.), Iowa
*Petoskey Portland Cement Co.	Petoskey	Petoskey (Lamson), Mich.
*Pittsburgh Plate Glass Co.	Pittsburgh	Fultonham (East Fultonham, Zanesville), Ohio
*Portland Cement Co. of Utah	Utah	Salt Lake City, Utah
Riverside Cement Co.	Riverside	Crestmore, Calif. Oro Grande, " [7]
*Santa Cruz Portland Cement Co.	Santa Cruz	Davenport, Calif. Silos at: Alameda, Calif. Stockton, " Long Beach, " Portland, Ore.
*Signal Mountain Portland Cement Co.	Signal Mountain	Chattanooga, Tenn.
*Southern States Portland Cement Co.	Southern States	Rockmart, Ga.
*Southwestern Portland Cement Co.	Southwestern	El Paso, Tex. Victorville, Calif. Osborn, Ohio

[7] Not operated since 1928. Fdgs., Par. One (3g).

Respondent	Hereinafter Called	Location of Mills and Silos
*Spokane Portland Cement Co.	Spokane	Irvin, Wash.
*Standard Portland Cement Co.	Standard	Painesville, Ohio
*Superior Cement Corp.	Superior	Superior, Ohio
Superior Portland Cement, Inc.	Superior Portland	Concrete, Wash. Seattle, Wash.
*Three Forks Portland Cement Co.	Three Forks	Trident, Mont.
*Trinity Portland Cement Co.	Trinity	Dallas (Eagle Ford), Texas Fort Worth, Texas Houston, Texas
*Union Portland Cement Co.	Union	Devils Slide, Utah
Universal Atlas Cement Co.	Universal Atlas	Buffington, Ind. Universal, Pa. Northampton, Pa. Duluth (Steelton), Minn. Leeds, Ala. Hannibal, Mo. Independence, Kan. Waco (Atco), Texas Hudson, N. Y.
*Valley Forge Cement Co.	Valley Forge	W. Conshohocken (Swedeland), Pa.
*Volunteer Portland Cement Co.	Volunteer	Caswell (Knoxville), Tenn.

Respondent.	Hereinafter Called	Location of Mills and Silos
*Vulcanite Portland Cement Co.	Vulcanite	Vulcanite (Phillipsburg), N. J.
*Wabash Portland Cement Co.	Wabash	Stroh, Ind. Osborn, Ohio
*West Penn Cement Co.	West Penn	West Winfield (Butler), Pa.
*The Whitehall Cement Manufacturing Co.	Whitehall	Northampton (Cementon), Pa.
*Wolverine Portland Cement Co.	Wolverine	Quincy, Mich. Coldwater, Mich.
*Yosemite Portland Cement Corp.	Yosemite	Merced, Calif.

List of Non-Respondent Producers As of July 2, 1937[8]

Non-Respondent	Hereinafter Called	Location of Mill	Citation
Allentown Portland Cement Co.	Allentown	Evansville, Pa.	Tr. 10517
Henry Cowell Lime & Cement Co.	Cowell	Cowell, Calif.	Tr. 8768-69
Ford Motor Co.	Ford	Dearborn, (Fordson), Mich.	Resp. Ex. 3765 B
Louisville Cement Co.	Louisville	Speed, Ind.	Tr. 13209
National Portland Cement Co.	National Portland	Brodhead, Pa.	Resp. Ex. 3765 C
Olympic Portland Cement Co.	Olympic	Bellingham, Wash.	Tr. 8522-23
Republic Portland Cement Co.	Republic	Longhorn (San Antonio), Texas	Com. Ex. 3145 B
San Antonio Portland Cement Co.	San Antonio	Cementville (San Antonio), Texas	Com. Ex. 3161 B
South Dakota State Cement Plant	South Dakota	Rapid City, S. D.	Tr. 12740-41
Standard Lime & Stone Co.	Standard Lime	Martinsburg, W. Va.	Com. Ex. 3159 C
Washington-Idaho Lime Products Co.	Washington-Idaho	Orofino, Idaho	Resp. Ex. 3765 C

[8] See Com. Exs. 1 (Map) and 3 (Bureau of Mines Statistics for 1932). Commission witness Bagley testified that these plants were in operation by the named companies according to the latest information known to the Bureau of Mines as late as November 1937 (C) Tr. 60.

PART I

BASIC FACTS ABOUT CEMENT, ITS MANUFACTURE AND MARKETS

A. The Product in Issue: Portland Cement.

Portland Cement was first made in England in 1824. It was called "Portland" cement because of its striking resemblance to stone quarried on the Island of Portland off the coast of England. It has continued to be so called to distinguish it from natural limestones and cements which were used in construction prior to 1824.[1]

Portland cement is the product resulting from the burning of calcareous materials (meaning anything containing an abundance of lime) and argillaceous materials (meaning chemical materials such as silica and alumina) until fused into "clinker" which is then ground with the addition of gypsum or calcium sulphate to a fine powder[2] (Fdgs. Par. Three (a)). The calcareous materials used are generally high or low grades of limestone, cement rock, marl and chalk and, in one or two cases, oyster shells. The argillaceous materials are clays, shale or alkali wastes. After the burning process gypsum is added to retard the setting properties of the cement.[3]

The unit of sale for cement adopted by the United States Bureau of Standards is the "barrel". Originally cement was contained in wooden barrels weighing 24 pounds and containing 376 pounds of cement. Since very early in the industry, however, a "barrel" of cement has meant four cloth or paper bags each containing one cubic foot or 94 pounds of cement, *i. e.*, 376 pounds net of cement and a gross ship-

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[1] Magee, Vice President, Alpha (R) Tr. 22516-19.

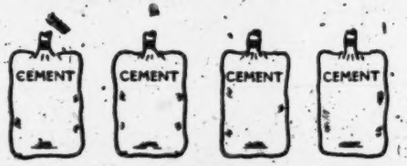
[2] Id., Tr. 22514, 22531-32.

[3] Id., Tr. 22531, 22543-44.

A BARREL

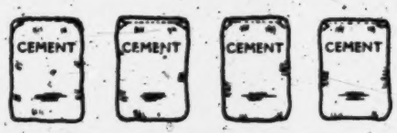
4 BAGS (CLOTH OR PAPER)

CLOTH



Leased at 10¢ each or 40¢ per barrel. Refunded at 10¢ each when returned in good condition.

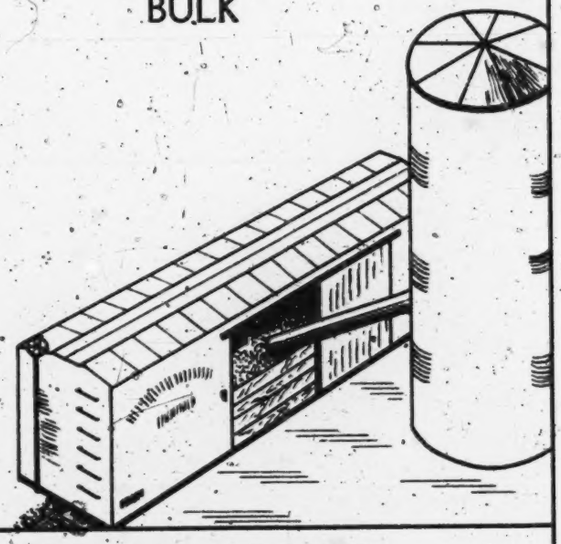
PAPER



Sold at 3¾¢ each or 15¢ per barrel. No refund.

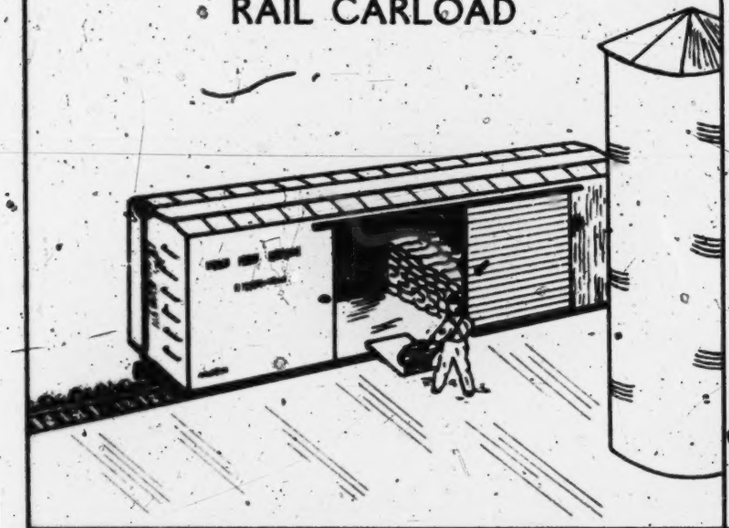
94 LBS. CEMENT IN EACH BAG OR 1 CU. FT.
1 LB. NET WEIGHT OF BAG
380 LBS. TO THE BARREL

BULK



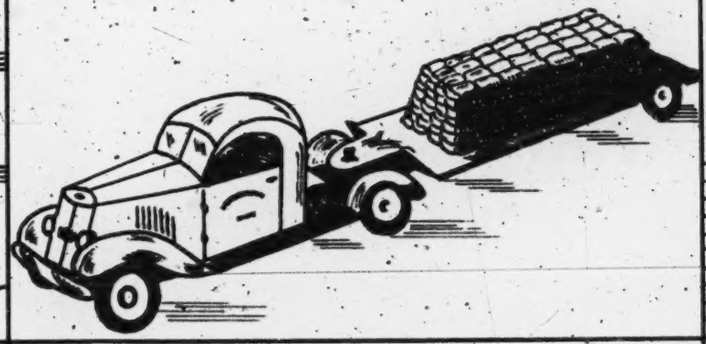
376 LBS. TO THE BARREL
CARLOADS ONLY

RAIL CARLOAD



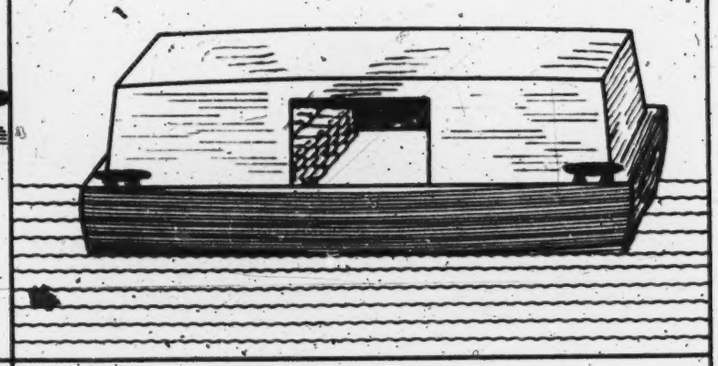
USUAL MINIMUM OF 132 BARRELS
MAXIMUM OF 320 BARRELS

TRUCK



VARYING QUANTITIES
USUAL MINIMUM OF 60 BARRELS

BARGE



LARGE QUANTITIES

ping weight of 380 pounds.[4] Cement is also sold in "bulk", that is without packaging but measured nevertheless in barrel units of 376 pounds.[5]

Cement is usually sold and shipped in carload lots.[6] The minimum weight of a carload of cement fixed by railroad tariffs on a large majority of railroads is 50,000 pounds which is equivalent to 132 barrels in cloth or paper.[7] In some parts of the southwest the minimum carload is 60,000 pounds or 160 barrels.[8] Depending on the size of the railroad cars, a carload may contain anywhere from the minimum of 132 barrels to 325 barrels.[9] Shipments of cement in less than carload lots can be made, but the freight charges per barrel are considerably higher than carload rates.[10] "Mixed carloads" are shipments of smaller quantities of Portland cement in the same car with other products of the manufacturer, such as white cement, mortar cement, high early strength cement,

[4] Magee, Vice President, Alpha, Tr. 22759; Fdgs., Par. 3(d).

[5] Id., Tr. 22760; Com. Exs. 164 J, 166; Resp. Exs. 546-554.

[6] Brobston, President, Hercules (R) Tr. 26139.
Bowen, Vice President, Lehigh (R) Tr. 26686.

[7] Jones, Asst. to Chief of Traffic Section, Proc. Div., U. S. Treas. Dept. (C) Tr. 9637.
Warren, G. E., Vice President, Southwestern (R) Tr. 29361.
Russell, Vice President, Peerless (R) Tr. 34458.
Blair, W. R., Sales Manager (El Paso), Southwestern (R) Tr. 38906.

[8] Blair, W. R., *supra*, Tr. 38907.

[9] Com. Ex. 1098: A comparison of bid prices of various cement producers to Supply Officer, U. S. Naval Air Station, Pensacola, Fla., on April 16, 1931, for delivery f.o.b. cars.
Com. Ex. 1099 C: Abstract of bids submitted by the various producers of Portland cement on Schedule #142 of Supplies for the U. S. Navy Dept., opening date, June 6, 1933.

[10] Simpson, Rate Clerk, I.C.C. (C) Tr. 9403-04, 9461.
Brobston, *supra*, Tr. 26139-40.

waterproof cement, and lime, of a sufficient quantity to bring the weight of the car up to the minimum carload rate.[11] On certain projects where the contractor has the proper equipment to receive it cement is shipped in bulk. In some areas plants are properly equipped for loading trucks and varying quantities move via trucks.[12] Movement by water is usually in large quantities.[13]

1. Standardization of Portland Cement

Portland cement is manufactured under standard specifications of the American Society for Testing Materials (hereinafter called the ASTM) and the National Bureau of Standards. For over thirty years all domestic Portland cements[1] have met or exceeded the minimum standard specifications.[2] One witness stated that while there is no compulsion to conform to the specifications it is a matter of commercial necessity for all domestic producers to meet them "by a generous margin"[3] and domestic cements do

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[11] Com. Ex. 2715 (1, 4, 5, 6): Nazareth—dealer invoices for April 1938.
Com. Ex. 2726 (2, 12, 14, 17-20): Missouri—dealer invoices for April 1938.
Com. Ex. 2728 (134, 146, 153): Medusa—dealer invoices for April 1938.
Com. Ex. 2730 (2, 3, 13, 15): Keystone—dealer invoices for April 1938.
Resp. Ex. 3627 C: Quotation, Nov. 22, 1937, Dewey to Moline Consumers Co.

[12] See Part VI, Sec. B, *infra*.

[13] See Part VII, Sec. A, *infra*.

[1] Unless otherwise stated "Portland cement" and "cement" refers to domestic brands.

[2] Fdgs., Par. 20(b).
Bowen, Vice President, Lehigh (R) Tr. 26605-06.

[3] Magee, Vice President, Alpha (R) Tr. 22774-75.

exceed the minimum specifications in varying degrees.[4] On the other hand the various brands of cement are used interchangeably by buyers who find all brands equally satisfactory for all practical commercial purposes, and will not pay a penny more for one brand than another.[5]

a. Historical Background

Until about 1905 imported cement was generally sufficiently superior in quality and performance to most domestic brands to command a premium in price.[1] The earliest important domestic standards for Portland cement were published by U. S. Government purchasers in their invitations to bid in about 1901.[2] The first general standard specifications were published in January 1904 by the American Society of Civil Engineers and other engineering societies.[3] Magee, Vice President in charge of operations of Alpha, testified about this as follows:

> "In 1904, it was, that the engineers, Civil Engineering Society and other engineering societies, got together and wrote a standard for cement which

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[4] Fdgs., Par. 20(b).
Brooke, Vice President, Monarch (R) Tr. 42187.
Elcock, Vice President, Southern States (R) Tr. 37482, 37484-85.
MacDonald, B. A., Vice President, Northwestern States (R) Tr. 36478-79.
Magee, Vice President, Alpha (R) Tr. 22866.
Manley, General Manager, Hawkeye (R) Tr. 41609.

[5] The evidence on this subject is digested in Part II, pp. 204-212, *infra*.

[1] Wray, Dealer (C) Tr. 7809.
Magee, *supra*, Tr. 22524.

[2] Bates, P. H., Chief of Plain Silicate Products Division, Nat'l Bur. of Standards (C) Tr. 48447-48.

[3] Resp. Ex. 411, p. 453: Proceedings of the Seventh Annual Meeting of the ASTM.
Brobston, President, Hercules (R) Tr. 26293.
Warren, G. E., Vice President, Southwestern (R) Tr. 29043-44.

was adopted by most people that bought cement, and those companies who made cement.

Prior to that time there was not only a great variation in the quality of the product but, on that account, there were many individual specifications written by individual manufacturers, and there was considerable confusion as to what the customer wanted and what he didn't want, and what the manufacturer had to offer and what he didn't have.

The standardization in 1904 was welcomed by all sides; that is, customers, engineers, and by the manufacturer, as well, although the idea of standardizing was promoted and developed by engineers and consumers." (Tr. 22777)

A representative of the Bureau of Standards testified that the Bureau tried to prevail upon cement manufacturers to adopt a single standard specification.[4] In November 1904 the ASTM adopted standard specifications based on proposals submitted by a joint committee composed of members of the ASTM, the ASCE, the American Railway Engineering and Maintenance of Way Association and the Association of American Portland Cement Manufacturers.[5] These standard specifications were revised to provide higher and stricter standards in 1908, 1909, 1916, 1921, 1927, 1930, 1937, and 1938 and over the years there has been an improvement in the quality of cement generally.[6]

b. The American Society for Testing Materials

The ASTM is a voluntary national technical society of professional engineers, testing experts, chemists, manufac-

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[4] Bates, P. H., Chief of Plain Silicate Products Division, Nat'l Bur. of Standards (C) Tr. 48437-38.

[5] Resp. Ex. 411, p. 574: Proceedings of the Seventh Annual Meeting of ASTM.
Magee, Vice President, Alpha (R) Tr. 22777-78, 22980.

[6] Fdgs., Par. 20(d).
Magee, *supra*, Tr. 22795-98, 22880, 22841.

turers, users and others interested in properties of materials. It was organized for the purpose of promoting the standardization of specifications and methods of testing. Many Government bureaus, including the Bureau of Standards, the Bureau of Reclamation, the War Department and the Treasury Department, are among its more than 4,000 members.[1] It is the only society for testing materials recognized by all bureaus of the United States Government.[2]

i. *Committee C-1*

The drafting and development of standard specifications and testing methods in the ASTM is carried on by numerous technical committees which function under definite regulations governing their organization and procedure.[3] The cement committee commonly known as "Committee C-1" is composed of scientifically and technically trained representatives of manufacturers, consumers and a general interest group.[4] The representation of these groups on Committee C-1 has varied. Thus, as of November 1, 1937, there were 34 producer voting memberships, 24 consumer voting memberships and 16 general interest voting memberships; as of December, 1938 the voting memberships of the producers, consumers and general interest groups were 39, 26 and 16 respectively.[5]

As to the influence of the respective groups on the deliberations of the cement committee a Commission witness testified that although on paper there was equality of repre-

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[1] Magee, Vice President, Alpha (R) Tr. 22774, 22845.
Resp. Ex. 417: ASTM Year Book (1938).

[2] Magee, *supra*, Tr. 22807.

[3] Resp. Ex. 415: ASTM Pamphlet (1937).

[4] Magee, *supra*, Tr. 22819-20.
Brobston, President, Hercules (R) Tr. 26282.
Jackson, Senior Engineer, U. S. Public Rds. Admin. (C) Tr. 48333-34, 48363-64.

[5] Resp. Exs. 415-416: ASTM Pamphlets (1937-38).

sentation between producers and the other groups, in his opinion there had been "distinct evidence during the years of predominating influence of producers' representatives on this committee". He stated further, however, that "there has been accumulating a gradual tendency for the consumers to force the adoption of higher requirements and new specifications" which has been brought about through a demand of "consumers outside of the organization who really use the Portland cement".[6]

The technical committees of the ASTM, including the cement committees, have never issued specifications. They merely draft proposed standards and submit them to a vote of the entire membership of the Society and a two-thirds favorable vote of those voting is necessary before adoption.[7]

c. Activities of Trade Associations: Adoption

[The ASTM standard specifications were adopted at a meeting of the Association of American Portland Cement Manufacturers in December, 1904.[1] At that meeting Mr. Lesley, President of the American Cement Company commented as follows:[2]

[Italicised part quoted in Fdgs. Par. Twenty (c)]

"* * * *This will certainly give us a common ground in the cement business on which we can meet, and will enable a standard uniform article to be made at a uniform price, and anything outside of this standard article will represent additional cost for additional trouble to meet the whims of any individual. I cer-*

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[6] Jackson, Senior Engineer, U. S. Public Rds. Admin. (C) Tr. 48337-38, 48340, 48342.

[7] Brobston, President, Hercules (R) Tr. 26282.
Warren, G. E., Vice President, Southwestern (R) Tr. 29047.
Jackson, *supra*, Tr. 48358-59.
Resp. Ex. 417: ASTM Pamphlets (1938).

[1] Com. Ex. 3235 T-U: Minutes of Meeting.

[2] Id.

tainly trust this will be dealt with as a commercial question, as well as an engineering one."]

The standard specifications of the ASTM or of the United States Government were recommended or adopted by other trade associations of the cement industry in later years. [In 1915 the Association of American Portland Cement Manufacturers recommended that no quotations for or sales of cement be made subject to any specifications other than those of the United States Government or the ASTM.[3] A later association, the Portland Cement Association, in 1919 recommended that no sales of cement be made except subject to specifications of the ASTM.][4] When The Cement Institute was organized in 1929 its Code of Ethics contained the following provision regarding specifications:[5]

"STANDARDIZATION OF PRODUCT

Due largely to the activity of the Bureau of Standards and other Bureaus of the United States Government, the benefit to all concerned, of standardization, is generally recognized. Portland Cement was one of the first important commodities for which a generally accepted standard specification was developed and today practically all Portland Cement is manufactured, sold and used, under the uniform Standard Specifications of the United States Government, the American Society of Testing Materials, and the American Standards Association.

Freak and unreasonable specifications increase costs not only of manufacturer but of dealer and user as well; they also tend to destroy confidence in a standard specification, and, not being in the public interest, should be discouraged.

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[3] Com. Ex. 3193, p. 5: Report of Committee on Trade Conditions published by A.A.P.C.M. (1915).

[4] Com. Ex. 3192, p. 16: Pamphlet on Trade Practices in The Cement Industry published by P.C.A. (1919).

[5] Com. Ex. 138 O-P; Code of Ethics.

> Therefore, it is declared that all Portland Cement manufactured and sold shall be guaranteed to meet the existing standard specifications of the American Society for Testing Materials, the American Standards Association, and the United States Government Master Specifications; that cement manufacturers shall not be responsible for the improper use of cement, and therefore shall not guarantee finished work.
>
> Failure of any manufacturer to observe these declarations shall be considered an unfair trade practice."

In a "Compendium of Established Terms and Marketing Methods" distributed by the Institute in 1935, it was stated that Portland cement marketed by members complies with the standard specifications "and/or tentative standards" of the ASTM, "and/or the American Standards Association and/or the Federal Specifications Board, and/or the United States Government."[6] [The NRA Code for the cement industry, which went into effect in November of 1933, contained a similar provision except that if cement was designed to meet unusual conditions not governed by the specifications referred to, the price for such modified cement should be filed with the Code Authority,[7] and the Chairman of the Code Authority announced that any guarantee regarding quality of cement beyond those specifications might be a violation of Article XIII, Section 2, of the Code.][8]

2. Special Specifications for Portland Cement

Cement manufactured and sold subject to the standard minimum specifications is commonly known as "Standard"

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[6] Com. Ex. 561, p. 15.

[7] Com. Ex. 557, p. 343.

[8] Com. Ex. 977: Letter, dated January 26, 1934, from Rader, Chairman of Code Authority, to all members of the industry.

Portland cement. A considerable amount of cement is nevertheless manufactured and sold to meet special specifications which may require finer grinding, quicker setting, lower heat of hydration or other such features.[1] Typical instances of this are special types of cement required by the federal government for its several large dam projects, *e.g.*, Fort Peck Dam, T.V.A. Tygart River Dam and others. In such cases a special specification for the given project to which the bidders must conform is included in the invitations to bid.[2] Producers have often met other individual requirements for Portland cement under other special specifications.[3] Manufacturing cement to special specifications requires some changes and modifications in processing and ordinarily costs more than standard cement,[4] but in all cases of such special cements, however, the users will not pay prices higher than for standard cement.[5]

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[1] Magee, Vice President, Alpha (R) Tr. 22669, 22673.
Brobston, President, Hercules (R) Tr. 26301-02.
Scott, H. M., President, Keystone (R) Tr. 27397.
Stone, Vice President, Universal Atlas (R) Tr. 35199.
Resp. Exs. 1104-1105: Hercules record of special cements sold and ground.
Resp. Exs. 2522-2523: Types of Cement Manufactured by Universal Atlas, 1926 and 1939.

[2] See *e.g.*, Com. Ex. 168 J-M (Fort Peck).
Resp. Ex. 2918 Z-9-20 (T.V.A.).
Com. Ex. 124, Pars. 15-39 (Parker Dam).
Com. Ex. 122, Pars. 15-39 (Colo. River).
Resp. Ex. 812, pp. 5-6 (Tygart River).

[3] See footnote 1, *supra*.

[4] Brobston, President, Hercules (R) Tr. 26300-01, 26306.
Elliott, Vice President, Whitehall (R) Tr. 28476.
Lewis, Manager, Volunteer (R) Tr. 31431-33, 31472.

[5] Stone, Vice President, Universal Atlas (R) Tr. 35202-03.
Moore, R. W., Vice President, Dewey (R) Tr. 46886.
Elliott, *supra*, Tr. 28476.
See also evidence collected with respect to bids to government agencies, Part IV, *infra*, p.

Cement manufacturers, although they have manufactured a considerable amount of cement under special specifications of public agencies and others, prefer to produce under the standard specifications. The testimony shows that the manufacture of "special" cement costs more, interrupts the general mill operation, and requires special storage facilities.[6] Scott, President of Keystone stated his attitude toward "special" cements as follows:[7]

> "Well, a specification which is adopted and been proven in the field over a period of years in actual construction work, and proven satisfactory, is the one that we believe should be favored and continued rather than the adoption or introduction of a great many experimental specifications that represent the vagaries or theories of some group of engineers or engineer which has not had the benefit of practical experience in the use of cement over a period of time in showing real results.
>
> Trial Examiner Norwood: Standardization,—does standardization make for lower costs?
>
> The Witness: Yes, sir; definitely."

In two instances innovations in specifications of two state highway departments, New Jersey and New York, representing departures from standard specifications which manufacturers thought arbitrary and unfair were resisted collectively. In each instance the matter was delegated to a committee by the members of Districts 1 and 2 of the Institute.[8]

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[6] Magee, Vice President, Alpha (R) Tr. 22580-81.
Moore, *supra*, Tr. 46869-70.
Scott, H. M., President, Keystone (R) Tr. 27568-71.
Brobston, *supra*, Tr. 26303.
Brooke, Vice President, Monarch (R) Tr. 42186-87.

[7] Scott, *supra*, Tr. 27570.

[8] Com. Ex. 637 T, EE: Minutes of Meeting of Northeastern Division, February 13, 1935.

At a meeting on October 26, 1934 the minutes record:

[Italicised part quoted in Fdgs. Par. Twenty (f)]

"The Chair recognized Mr. Wetzler, who brought up the question of unfair specifications in the State of New Jersey. After discussion, Mr. Coffin moved that members of the Industry, in Districts #1 and #2, respectfully request the Portland Cement Association to take under consideration, steps to eliminate the unfair specifications now in effect in New Jersey. Seconded by Mr. Blaine S. Smith and unanimously carried." (Com. Ex. 637 T)

Brobston, President of Hercules, asked about the purpose of appointing the committee in connection with the New Jersey incident said:[9]

> "The specifications in the State of New Jersey, the published specifications were perfectly satisfactory, but this chief highway engineer, Mr. Gage, was putting pressure on the cement companies to furnish him with a special cement which he thought was better than the regular cement, and this committee was appointed to see if they could not get Mr. Gage to accept the standard cement and comply with his own specifications."

[Italicised part quoted in Fdgs. Par. Twenty (f)]

In the New York instance the committee was appointed *"to wait on the New York State Highway Department with a request that they change the strengths in Specifications 15 and 15 S to conform with present standard specifications."*[10]

The special specification was not adopted by the New Jersey State Highway Commission.[11] There is no evidence as to the outcome in New York.

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[9] (R) Tr. 26299.

[10] Com. Ex. 637 X: Minutes of Meeting of Northeastern Division, February 13, 1935.

[11] Magee, Vice President, Alpha (R) Tr. 22897.

In 1930, minimum specifications for High-Early strength cement was adopted by the ASTM.[12] The principal difference between standard cement and High-Early strength cement is that the latter is ground much finer, burned harder and accordingly reaches usable strength quicker. Some of the cement previously sold as standard approximated in quality the High-Early strength specifications. High-Early strength cement has commanded a premium price of approximately 50¢ per barrel over standard cement.[13] By ruling no issue is raised as to High-Early strength or other special cements.[14]

3. The Buyer and Standardization

Consumers of cement, as well as engineers and architects, are interested in materials of known quality.[1] They have favored standardization because it has helped in insuring and promoting good construction generally.[2] It has safeguarded them against the inferior brands which existed prior to 1904.[3]

Some differences among brands of Portland cement occur because all brands not only meet, but exceed the standard specifications in one or several respects.[4] Thus, F. H. Jackson of the U. S. Public Roads Administration testified that tests revealed that the performance of the various standardized cements exceeded the requirements of the ASTM "by various degrees * * * the range would

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[12] Jackson, Senior Engineer, U. S. Public Rds. Admin. (C) Tr. 48343.

[13] , Tr. 48345-48; Fdgs., Par. 20(b).

[14] Tr. 36727-28, 40116-19, 42230-31.

[1] Bowen, Vice President, Lehigh (R) Tr. 26605.

[2] Magee, Vice President, Alpha (R) Tr. 22778.
Brooke, Vice President, Monarch (R) Tr. 42188.

[3] Magee, *supra*, Tr. 22980.

[4] See pp. 20-21, *supra*.

be almost 100 per cent. based on the minimum requirement.'"[5] And P. H. Bates of the Bureau of Standards testified that "as measured by strength"[6] the difference in brands "might vary from 50 to 100 per cent." The strength test, he added, was considered a "very important test, for certain cases it would be the most important."[6] The buyers' prime interest, however, is in whether or not the cement meets the standard specifications and it is undisputed in the evidence that no buyer will pay a penny more for one brand than another regardless of variations above the minimum standards.[7] Price being equal, however, there is evidence from one state purchasing agent that he is influenced in making awards by variations in the strength test of the brands of various bidders.[8]

Individual producers seek to maintain their quality as high as their competitors by periodic testing of competitors' brands, and this has furthered the degree of increased quality of all brands above the minimum standards.[9]

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[5] (C) Tr. 48345.

[6] (C) Tr. 48420.

[7] Moore, R. W., Vice President, Dewey (R) Tr. 47321; Fdgs., Par. 9(a).
Compl. Count II, Par. 8, R. 241.
Rice, Attorney, U. S. War Dept. (C) Tr. 1737.
Ashley, Chief of the Division of Purchases, U. S. Dept. of Agriculture (C) Tr. 5470.
McCracken, Dealer (R) Tr. 36753.
Bass, Attorney-Examiner, F.T.C. (C) Tr. 13458.
Horner, President, Kosmos (C) Tr. 12438; (R) Tr. 36808.
Browder, Traffic Manager, Penn-Dixie (R) Tr. 38143-44.
See: Part II, pp. 204-212, *infra.*

[8] Lemmon, Purchasing Agent, Va. Dept. of H'ways (C) Tr. 345, 370.

[9] Magee, Vice President, Alpha (R) Tr. 22865-66.
Brobston, President, Hercules (R) Tr. 26295.
Moore, R. W., Vice President, Dewey (R) Tr. 46874-75, 47320.
Elcock, Vice President, Southern States (R) Tr. 37484-85, 37487.
Brooke, Vice President, Monarch (R) Tr. 42187.

B. Uses for Cement.

Note:

Respondents accept the finding of the Commission that (Par. 3(b)):

> "Cement is used in street and highway construction, in water power, irrigation, and flood control works, in most heavy construction work, in general building, in various public projects, in the production of blocks, pipes, and other products, and in many other ways. * * * Shipments from domestic cement plants during each of the 10 years from 1928 to 1937, inclusive, expressed in terms of barrels to the nearest million were:

Year	Barrels
1928	176,000,000
1929	170,000,000
1930	159,000,000
1931	127,000,000
1932	81,000,000
1933	64,000,000
1934	75,000,000[1]
1935	75,000,000
1936	113,000,000
1937	114,000,000"

The following digest of the evidence regarding uses for cement is accordingly confined to matters other than the fact findings conceded above.

In its various uses cement is used as an ingredient of concrete, which is made by mixing cement with sand, gravel, broken stone or other aggregates and using water as the mixing agent. As the water enters into chemical combina-

[1] The actual figure is 75,901,279 barrels (Resp. Ex. 3778 B). Therefore the nearest million should be 76,000,000.

tion with the cement the mass solidifies, hardens and takes on the strength that concrete has. Cement is the binding agent that holds together the sand and stone. In large massive structures the usual mixture is 1-3-6 *i.e.*, one part cement, three parts sand and six parts crushed stone or gravel. To meet the strength requirements of structural and road work the proportion of cement is increased so that the mixture is 1-2½-5 or 1-2-4. Varying proportions are used by different engineers.[2]

The total cost of cement in relation to the total cost of construction of projects in which it is used varies with the type of project and is shown in Chart I-B on page 34.

United States Department of Labor statistics based upon 2017 Federal road projects completed between July, 1935 and August, 1937, show[3] that in road construction for every million dollars spent, $346,000 was spent for materials and of this amount 14% was spent for cement and 16% for sand, gravel and crushed stone. The department's report states that "On concrete paving jobs materials such as cement and sand and gravel are important factors in the cost."[4]

Another tabulation prepared by the Department of Labor, covering all types of PWA Construction Projects from July, 1933 to June, 1937,[5] shows a total contract cost of $3,674,243,875 and a total material cost of $1,708,685,535. The cost of cement was $184,573,417 or 10.2% of the total material cost and 5.0% of the total contract cost. In this tabulation the cost of cement in relation to the cost of other materials in the different types of projects is shown to

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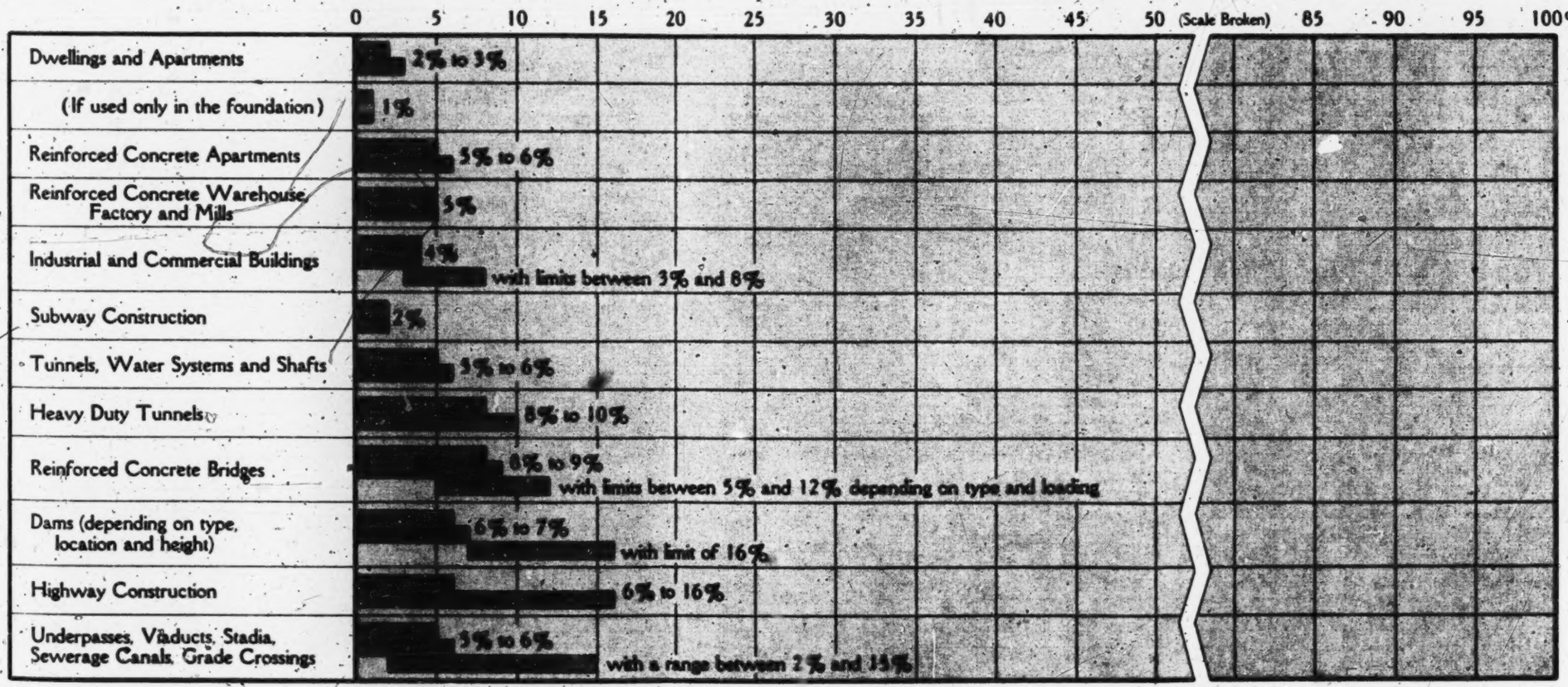
[2] Magee, Vice President, Alpha (R) Tr. 22515-16.

[3] Com. Ex. 3304 A-B: Reprint from the Monthly Labor Review (April, 1939) of the Bureau of Labor Statistics, entitled "Labor Requirements in Road Construction."

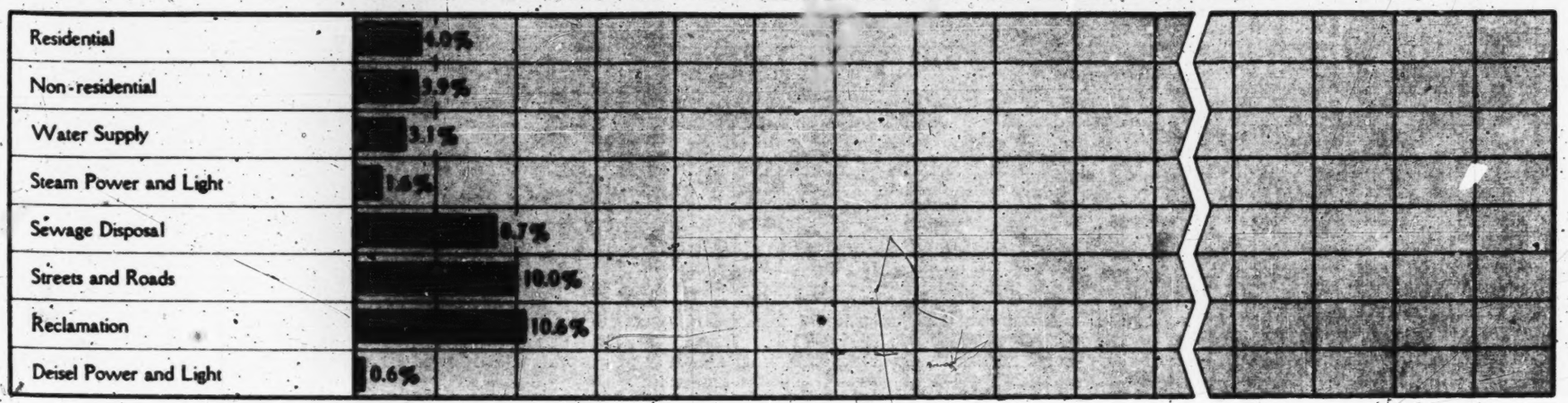
[4] Id.

[5] Resp. Ex. 2532.

SECTION (A) - TESTIMONY OF MR. R. S. SCHULTZ, JR., SENIOR ENGINEER FOR FORD, BACON & DAVIS. (R) TR. 47523, 47528-34



SECTION (B) - COMPUTED FROM DATA PREPARED BY THE BUREAU OF LABOR STATISTICS, DIVISION OF CONSTRUCTION AND PUBLIC EMPLOYMENT. RESP. EXS. 3663-3670



have varied from a low of 6.2% for School Projects to a high of 36.8% for Concrete Paving and the cost of cement in relation to the contract cost in these same projects varied from 3.3% to 18.9%.

C. Who Buys Cement.

Note:

Respondents accept the Commission's finding that (Par. 3(c)):

> "Manufacturers customarily market cement by sales to dealers for resale, to processors who sell ready mixed cement, to manufacturers of cement products such as blocks and pipes, to contractors who use it in construction, to railroads and other large commercial users, and to governmental agencies."

The evidence to this effect is accordingly not digested herein.

1. Dealers[1]

For well over thirty years, the greater proportion of the retail sale of cement has been handled by building material dealers.[2] These dealers are located throughout the

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[1] The complete evidence respecting cement dealers, and the issues relating to their activities, influence and importance in the marketing of cement will be found in Part XII, *infra*.

[2] Coogan, Vice President, Alpha (R) Tr. 23558-59, 23635, 24721.
Brobston, President, Hercules (R) Tr. 26022.
Bowen, Vice President, Lehigh (R) Tr. 26629-30, 26685-87.
Stone, Vice President, Universal Atlas (R) Tr. 35075-76.
Nelson, J. L., Vice President, Wolverine (R) Tr. 35895, 35916.
Runion, Secretary, Nebraska Lbr. Merchants Ass'n (C) Tr. 12049-50.
Rader, Vice President, Lehigh (C) Tr. 12962-63.

country in almost every city, town and village.[3] Except for the very early years they have purchased cement direct from the manufacturers,[4] and for many years most dealers have bought and stocked several brands of cement.[5]

It was conceded by Commission counsel at the hearings before the Commission that "dealer business is the backbone to the cement manufacturers' distribution system"[6] and the Trial Examiner agreed, saying:[7]

> "I do not think there is any evidence to the contrary that the manufacturers—the main part of their business, the substantial part, is through dealers; that it is diversified business; that it is more substantial for that reason, goes through many small sources, and does not subject him to violent reactions in the matter of quantity, as between one year and another."

The evidence of the comparative importance of sales to dealers as against sales to government agencies is shown in Chart I-C on page 37. Where there is either no solid black bar or no cross-hatched bar for any company shown on the chart this means only that there is no evidence on the point for that company and does not mean that the company made no sales to dealers or to government agencies, as the case may be.

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[3] Coogan, Vice President, Alpha (R) Tr. 23601.
Hogan, President, Lone Star (R) Tr. 34659.

[4] Bowen, Vice President, Lehigh (R) Tr. 26629.
Coogan, *supra*, Tr. 23044-46.

[5] Coogan, *supra*, Tr. 23306-07.
Elliott, Vice President, Whitehall (R) Tr. 28575.
Scott, H. M., President, Keystone (R) Tr. 27633.
McKee, Vice President, West Penn (R) Tr. 27714.
Robeson, Vice President, Nazareth (R) Tr. 28022.
Warren, F. B., Vice President, Bessemer (R) Tr. 32182.

[6] (C) Tr. 28570-71.

[7] (C) Tr. 28572.

Sales to Dealers — Sales to Government Agencies

PERCENT

COMPANY		COMPANY	REFERENCE
Alpha		Alpha	Tr. 25883
Ash Grove		Ash Grove	Tr. 13732
Edison		Edison	Tr. 35767
Green Bag, W. Va.	Small	Green Bag, W. Va.	Tr. 29530
Hercules (1)		Hercules (1)	Resp. Ex. 1091 1084
Hermitage		Hermitage	Tr. 36208-09
Kosmos		Kosmos	Tr. 36818.
Lone Star	Added Expense	Lone Star	Tr. 32774 32739
Marquette		Marquette	Tr. 39971-72
Medusa (2)		Medusa (2)	Resp. Ex. 3067
Missouri (3)		Missouri (3)	Resp. Ex. 2795
Monarch		Monarch	Tr. 42192-94
Nazareth		Nazareth	Tr. 28343-09 28054-55
North American		North American	Tr. 33896
Northwestern States		Northwestern States	Tr. 36485
Peerless	Spotty	Peerless	Tr. 34376 34231 34242
Petoskey	Spotty	Petoskey	Tr. 38754 38732
Pittsburg	Spotty	Pittsburg	Tr. 37702 & 07
South Dakota		South Dakota	Tr. 12747
Southern States		Southern States	Tr. 37539-40
Southwestern, O.	Minor	Southwestern, O.	Tr. 29108-09 39008-09 28956
Southwestern, Tex.		Southwestern, Tex.	Tr. 38953-54
Universal Atlas (4)		Universal Atlas (4)	Resp. Ex. 2473
West Penn		West Penn	Tr. 27752 27915
Whitehall	Very Small	Whitehall	Tr. 28609 28568 28613 28560
Wolverine	Very Small	Wolverine	Tr. 35916 35981
Bessemer	Added Expense	Bessemer	Tr. 32186 32322
Cumberland		Cumberland	Tr. 39857
Dewey		Dewey	Tr. 47076
Hawkeye		Hawkeye	Tr. 41628-31
Keystone		Keystone	Tr. 27485 & 27561-62
Lehigh		Lehigh	Tr. 12962-63
Louisville		Louisville	Tr. 13280-81
National		National	Tr. 39533
Superior		Superior	Tr. 29507-8
Federal	One of Smallest	Federal	Tr. 30597
Lawrence		Lawrence	Tr. 31195-97
Nebraska		Nebraska	Tr. 42097
Penn-Dixie		Penn-Dixie	Tr. 38148-49

Owned Entirely
Backbone
By Far Greatest Percentage
Primary Outlet
Substantial
Largest Portion
Backbone
Most Important
Greater Portion

No definite percentages given but expressed in terms as indicated

0 5 10 15 20 25 30 35 40 45 50 55 60 65 70 75 80 85 90 95 100

PERCENT

(1) Computed from Resp. Ex. 1084: Sales to dealers, 1935-1938 and Resp. Ex. 1091 Sales to Government, 1927-1932, 1934-1938.
(2) Computed from Resp. Ex. 3067: Shipments to customers, 1933-July 1937.
(3) Computed from Resp. Ex. 2795: Sales to dealers and to governments, 1930-1939.

The Wheeler Chart Co., N. Y.

2. Governmental Bodies

In some years some federal and state governmental agencies have purchased large quantities of cement particularly at times during the period from 1931 to 1936. Some states, for example, undertook large road construction programs during 1931-1933. Bids or abstracts of bids for cement requirements by nine states covering varying years are in evidence. They show that bids were invited for the following amounts by the following state highway departments:

State		Barrels
Illinois	1932	5,000,000[1]
	1933	3,300,000[2]
Iowa	1931	1,000,000[3]
	1932	1,000,000[4]
Indiana	1931	1,750,000[5]
	1932	2,000,000[6]
Louisiana	1931	8,500,000[7]
Missouri	1931	3,316,400[8]
	1932	1,553,300[9]
Wisconsin	1931	2,400,000[10]

[1] Com. Ex. 1884.

[2] Com. Ex. 1888.

[3] Com. Ex. 1846.

[4] Com. Ex. 1849.

[5] Com. Ex. 1875.

[6] Com. Ex. 1863.

[7] Com. Ex. 2452.

[8] Com. Exs. 2440, 2441.

[9] Com. Ex. 2442.

[10] Com. Exs. 1910, 1911.

These were the largest amounts of cement called for by states shown in the evidence. There is no evidence, however, as to the actual amounts used by any of the states upon the awards made.

Similarly the federal government undertook several large dam building projects in the mid-1930's. Thus T.V.A. sought bids on over 6,000,000 barrels in 1934;[11] Grand Coulee Dam, 4,200,000 barrels in 1935;[12] Tygart Dam, 1,200,000 barrels in 1935;[13] Fort Peck Dam, 610,000 barrels in 1935 and 605,000 barrels in 1936[14] and there were others of similar character.

Cement producers have found sales to the federal government less desirable than their regular dealer business for a variety of reasons: it has taken unearned discounts[15] and is not a "repeat buyer";[16] requires "same and more" services and sales effort, although the smallest customer;[17]

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[11] Com. Ex. 401.

[12] Com. Ex. 112 D.

[13] Com. Ex. 178 A.

[14] Com. Exs. 168 A, 169 A.

[15] Ackerman, Vice President, Lawrence (R) Tr. 31195-97.
Brooke, Vice President, Monarch (R) Tr. 42192-93.
Elcock, Vice President, Southern States (R) Tr. 37577.
Blair, W. R., Sales Manager (El Paso), Southwestern (R) Tr. 39008-09.

[16] Ackerman, *supra*, Tr. 31195-97.
Brooke, *supra*, Tr. 42192-93.
Browder, Traffic Manager, Penn-Dixie (R) Tr. 38148-49.
Lucas, Vice President, Petoskey (R) Tr. 38732, 38750.
Russell, Vice President, Peerless (R) Tr. 34242.

[17] Browder, *supra*, Tr. 38148-49.
Elliott, Vice President, Whitehall (R) Tr. 28615, 28661-62.
Brooke, *supra*, Tr. 42192-93.
Bates, J. E., Sales Manager, Federal (R) Tr. 30597, 30624-25.

it involves additional cost for manufacture, testing, and special storage bins;[18] it is slow in payment.[19]

D. Inception and Nation-wide Spread of the Industry; Capacity Expansion; Plurality of Ownership.

Note:

Respondents accept the following Findings of the Commission dealing with this subject (Par. 3(a)):

> "* * * The first mill for the commercial manufacture of cement in this country was established in Pennsylvania some 70 years ago. Prior to that time the cement used in this country was imported from abroad. The raw materials and fuel necessary for the production of cement are available in many parts of the United States and its manufacture has gradually spread until there are now cement-producing plants in many States, including Alabama, Arkansas, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, New Jersey, New York, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming. There are approximately 80 manufacturers of cement in the United States and the total number of mills operated by them is about 150."

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[18] Elliott, Vice President, Whitehall (R) Tr. 28615, 28661-62.
Warren, G. E., Vice President, Southwestern (R) Tr. 28961.
Browder, Traffic Manager, Penn-Dixie (R) Tr. 38148-49.
Warren, F. B., Vice President, Bessemer (R) Tr. 32322-23.
Koch, Vice President, Lone Star (R) Tr. 32739.

[19] Russell, Vice President, Peerless (R) Tr. 34231-32.
Warren, G. E., *supra*, Tr. 28961.
Elliott, *supra*, Tr. 28669.

And the following (Par. 4(a)):

> "Five of the some 80 companies producing cement—Alpha, Lehigh, Lone Star, Penn-Dixie, and Universal—operate 49 out of the approximate total of 150 manufacturing plants. The productive capacity of these 5 respondents exceeds one-third of the total capacity of the industry, and their manufacturing plants are so located as to enable one or more of these respondents effectively to reach all parts of the United States except the West Coast in the sale of cement. These respondents and 5 others control more than one-half of the productive capacity of the industry. These 10 and 16 other respondents account for approximately three-fourths of the total capacity of the industry."

The evidence regarding the foregoing accepted Findings of the Commission will accordingly be omitted in this digest, except as noted in the footnote.[1]

1. Inception of Domestic Cement Manufacture

The first cement plant in the United States was built in 1872 by a man named Saylor, at Siegfried in the Lehigh Valley, Pennsylvania. It had a productive capacity of 1,500 barrels a year.[1] As of 1937 the annual productive capacity of the industry is estimated at over 250,000,000 barrels.[2]

Antedating Saylor's mill there had been various unsuccessful attempts at manufacturing elsewhere, as in Maine and Michigan.[3] Domestic manufacturers at first

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[1] This percentage is not accepted. The evidence on this is digested at pp. 48-51, *infra*.

[1] Magee, Vice President, Alpha (R) Tr. 22523, 22525-26.

[2] Com. Ex. 3205: Mallory Statistics on Estimated Clinker Capacity for 1936-38, Districts #1 through #12.

[3] Magee, *supra*, Tr. 22523, 22527.

met with difficulties because their product was of low quality and not uniform.[4] But in the Lehigh Valley there was a rock deposit, known as cement rock, containing the correct mixture of low grade limestone and other chemical elements. This cement rock is sedimentary in character and thus more easily crushed and ground. There are only two or three such natural deposits elsewhere and there was no suitable deposit nearer to the largest markets. Consequently production had a good start in the Lehigh Valley.[5]

Until 1897 domestic production was less than imports which came mainly from England and Germany. At about that time domestic specifications were recast and American engineers began to realize that it was possible to manufacture a satisfactory product at home. At the same time a better understanding developed as to the wisdom of the use of Portland cement for permanent construction. And so domestic production increased until in 1897 and thereafter it exceeded imports.[6]

2. Capacity Expansion

Prior to 1900, the Lehigh Valley was the principal domestic source of supply.[1] The term Lehigh Valley is used to refer to a deposit of natural cement rock between

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[4] Magee, Vice President, Alpha (R) Tr. 22524-25.
Brobston, President, Hercules (R) Tr. 26194-95.

[5] Magee, *supra*, Tr. 22537-39, 22553-54.
Brobston, *supra*, Tr. 25974, 25977-79, 25981-82.
Com. Ex. 2878 K-L: Excerpt from Wheeler Hearings, testimony of Affleck, President, Universal Atlas, 3/31/36.

[6] Resp. Ex. 411, pp. 448-54: Lesley on Statistics of the Cement Industry.

[1] Coogan, Vice President, Alpha (R) Tr. 23098.
Com. Ex. 2878 K-L, *supra*.
Resp. Ex. 3488 B-D: Tabulation showing Portland cement production in Lehigh Valley compared with total in U. S. 1890-1937.

20 and 25 miles in length lying between the Delaware and Lehigh Rivers.[2] It is in United States Bureau of Mines, District No. 1. Although the productive capacity of this District increased substantially, due to its excellent raw material deposit and proximity to major markets, nevertheless it decreased by comparison with the increasing capacity of the industry as a whole and in 1937 represented but 18.2% of the total domestic production.[3] The resources of the Lehigh Valley have been depleted in part and it no longer is considered to hold its original position of importance.[4]

The position of the Lehigh Valley in relation to total production in the United States from 1890 to the date of the complaint is shown on Chart I-E on page 45.

With the turn of the twentieth century, there was increasing demand for cement in the interior of the United States concurrent with the development of new uses for the product. It was then found feasible to manufacture a good grade of cement in the middle west, although formerly there had been a belief to the contrary. New capital and new manufacturers entered the field and better service, through proximity to the consumer, gave impetus to expansion.[5]

In 1900 there were about 50 domestic plants in existence.[6] By 1910 the number had increased to some 125, owned by about 100 companies, and over 40 plants were lo-

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[2] Magee, Vice President, Alpha (R) Tr. 22553-54.

[3] Resp. Ex. 3488 A, D, *supra.*
Nelson, J. L., Vice President, Wolverine (R) Tr. 36043-44.

[4] Magee, *supra,* Tr. 22537-38.

[5] Resp. Ex. 3745 B: Excerpt from Wheeler Hearings, testimony of B. S. Smith, March, 1936.
Bowen, Vice President, Lehigh (R) Tr. 26563-65.
Com. Ex. 2878 K-L: Excerpts from Wheeler Hearings, testimony of Affleck, President, Universal Atlas 3/31/36.

[6] Resp. Ex. 411, p. 451: Lesley on Statistics of The Cement Industry.

PORTLAND CEMENT PRODUCTION IN LEHIGH VALLEY*
COMPARED WITH
TOTAL PRODUCED IN THE UNITED STATES
1890 - 1937

STATISTICS COMPILED FROM U S BUREAU OF MINES MINERALS YEARBOOKS

RESP EX 3488

Percent

Millions of Barrels

Percentage of U. S. Total Produced in Lehigh Valley

U. S. Total Production

Lehigh Valley Production

59.9 54.6 51.3 44.9 60.8 64.0 67.9 74.6 72.4 72.7 72.5 67.6 62.9 55.2 53.6 49.3 49.0 50.1 39.6 37.3

1890 '91 '92 '93 '94 '95 '96 '97 '98 '99 1900 '01 '02 '03 '04 '05 '06 '07 '08 '09 '10 '11 '12 '13 '14 '15 '16 '17 '18 '19 '20 '21 '22 '23 '24 '25 '26 '27 '28 '29 '30 '31 '32 '33 '34 '35 '36 '37

* LEHIGH VALLEY -- 1890 - 1902 Lehigh and Northampton Counties, Pennsylvania, and Warren County, N. J.
1903 - 1919 Eastern Pennsylvania and Warren, New Jersey

cated west of the Mississippi River.[7] From 1910 to 1937 about 80 new plants were constructed and about 60 new companies formed.[8] But during the same period, many companies went out of business, several merged, some were purchased by others and many plants were abandoned, dismantled, or discontinued operations.[9] In 1937 there was a total of about 150 plants located in 35 states and owned by nearly 90 companies.[10] Only 2 of the plants in existence in 1937 were constructed after 1929.[11]

Reference to a map of plant locations as of 1937 shows them to be widely distributed throughout the country with some concentration in the regions proximate to our largest cities and industrial areas.[12]

3. Cement Capacity: Company Groupings

A tabulation prepared by the statistician Mallory listing estimated clinker capacities of the mills in each of the twelve

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[7] Resp. Ex. 3764 A-E: List of Portland Cement Manufacturing Plants in U. S., 1910.

[8] Resp. Ex. 3765 A-C: List of New Portland Cement Plants 1911-1937.

[9] Resp. Ex. 2405 A-D: List showing change in status of cement plants 1920-1939.
Resp. Ex. 2521: Memorandum dated 3/16/40, Carlson, Universal Atlas.
Browder, Traffic Manager, Penn-Dixie (R) Tr. 38133.
Porter, President, North American (R) Tr. 33739, 33744.
Coogan, Vice President, Alpha (R) Tr. 23015-17.
Bowen, Vice President, Lehigh (R) Tr. 26580-86.

[10] Fdgs., Par. 4(a). White, Examiner on Economic Staff, F.T.C. (C) Tr. 51-55.
Com. Ex. 1: Map of U. S. showing plant locations, prepared from Bureau of Mines Statistics.

[11] Resp. Ex. 2520: List dated 3/12/40 of cement plants built since 1920.
Resp. Ex. 3765: List of New Portland Cement Plants from 1911-1937.

[12] Com. Ex. 1, *supra*.

Bureau of Mines districts[1] for the years 1936 to 1938 shows a total capacity of 251,986,000 barrels for the year 1937 concentrated to the following extent:

Producers	Aggregate Capacity in Barrels and Percentage of Total Capacity[2]
1. Five largest (Alpha, Lehigh, Lone Star, Penn-Dixie, Universal)	96,237,000 (38.19%)
2. Above five and five next largest (Medusa, Marquette, Huron, Missouri, Southwestern)	126,291,000 (50.11%)
3. Above ten and sixteen next largest (Riverside, North American, Lawrence, Dewey, Trinity, California, Northwestern States, Peerless, Ash Grove, Pacific, Consolidated, Edison, Coplay, Colorado, Hercules, Keystone)[3]	176,091,000 (69.88%)

By grouping Great Lakes with Lehigh (which owns it), and two groups of companies composed of ten separate respondents, i.e., Florida, Trinity, Signal Mountain and Consolidated as "controlled"[4] by the non-party Cowham Engineering Company and Oklahoma, Three Forks, Union, Nebraska, Colorado and Arkansas as "controlled"[5] by the non-party Ideal Cement Company, the aggregate capacity of the "ten" largest petitioners and the next sixteen,

[1] Com. Ex. 3205.

[2] Computed.

[3] Vulcanite is omitted as it has not produced cement since 1933 (See Fdgs., Par. 1, subd. (3v)).

[4] Fdgs., Par. 4(b).

[5] Fdgs., Par. 4(b).

Missouri, Southwestern, Riverside, North American, Lawrence, Dewey, California, Northwestern States, Peerless, Ash Grove, Pacific, Edison, Coplay, Hercules, Keystone and Giant, which is an actual total of thirty-five petitioners, amounts to 189,700,000 barrels or 75.28% of the total.

4. Inter-Relationships Among Corporate Respondents

The Cowham Engineering Company holds stock in, manages and directs the properties and sales of Florida, Trinity, Signal Mountain and Consolidated.[1] Lehigh owns a trifle more than 50% of the stock of Great Lakes. Since Great Lakes began operating in early 1927, all of its cement has been marketed by Lehigh. Lehigh actively participates in the management of Great Lakes only to the extent that Mr. Young and Mr. Bowen are directors of Great Lakes and Mr. Baer, Lehigh's vice president in charge of operations, is one of the vice presidents of Great Lakes.[2] The president of Hermitage is also the president of Cumberland. There is no connection between the sales departments of the two companies; no arrangement between them as to the sharing of business in their territories; nor do any of the salesmen of Hermitage act for Cumberland or vice versa.[3] Monolith owns a controlling interest in Monolith-Midwest.[4] The President of Medusa was for many years an officer of Petoskey. He resigned as president of Petos-

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[1] Fdgs., Par. 4(b).
Miller, H., Treasurer, Trinity (C) Tr. 13337-40, 13344, 13360-62, 13367-69.
Storey, Vice President, Florida, Trinity & Signal Mountain, President, Consolidated (R) Tr. 47569-71.

[2] Bowen, Vice President, Lehigh (R) Tr. 26549-50.

[3] Fdgs., Par. 4(b).
McGovern, Sales Manager, Hermitage (R) Tr. 36107-08.
Pearson, Secretary-Treasurer, Cumberland (R) Tr. 39818-20.

[4] Vance, former Vice President, Monolith-Midwest (C) Tr. 9340-41.

key in January, 1937, but has continued since that time as a director of that company.[5] All the officers and directors of Valley Forge are officers and directors of the Allentown Portland Cement Company.[6] In the spring of 1927 Bessemer Securities Company acquired all the preferred stock and one-half of the common stock in Federal. In the same year, but subsequent to its acquisition of its interest in Federal, Bessemer Securities Company acquired about ten per cent of the common stock in Bessemer.[7] In either 1927 or 1928 Bessemer Securities Company acquired about a one-sixth interest in the common stock of Peerless.[8]

In July, 1932, Castalia shut down its mill. Thereafter it commenced to purchase cement from Medusa until December 31, 1937, when Medusa refused to sell it any more cement. Medusa continued to make a few shipments of cement for Castalia in January, 1938, to wind up Castalia's contracts under which shipments had been commenced.[9]

Vulcanite, since it closed its manufacturing plant in 1933 has secured its supplies of cement from Hercules.[10]

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[5] Fdgs., Par. 4(b).
Dawson, Vice President, Medusa (R) Tr. 40023.

[6] Fdgs., Par. 4(b).
Com. Ex. 3138 A-C: Letter, May 29, 1931, F. A. Weibel (Valley Forge) to F.T.C. answering questionnaire.
Com. Ex. 3149 A-D: Letter, June 5, 1931, F. A. Weibel (Allentown Portland Cement Company) to F.T.C. answering questionnaire.

[7] Snyder, Vice President, Federal (R) Tr. 30403.

[8] Id., Tr. 30404, 30411.

[9] Millard, Bookkeeper, Castalia (R) Tr. 47672-74.

[10] Brobston, President, Hercules (C) Tr. 10544.
Mallory, Statistician, Institute (C) Tr. 17509-10.
Com. Ex. 426 O-Q: Memo. dated March 9, 1934, by Moyer (Vulcanite) re Plan for Sharing Available Business.
Resp. Ex. 1100: Tabulation of sales made to Hercules customers and of sales made to Vulcanite, 1928-39.

A commission attorney testified he was informed that all the stock of Oklahoma, Three Forks, Union, Nebraska, Colorado and Arkansas was owned by the Ideal Cement Company,[11] of which Charles Boettcher is President.[12] These respondents sell the output of the mills owned by Ideal Cement Company.[13] Boettcher is a stockholder of Alpha, Southwestern, Oregon and Lehigh and his son C. K. Boettcher was a director of Alpha.[14]

E. The Manufacture of Cement; Specialized Nature and Cost of Equipment; Production Costs and Plant Investments.

1. The Manufacture of Cement

In the manufacture of cement there are four major steps, namely, quarrying, crushing, burning (or calcining), and the grinding of clinker.[1] These major steps involve between 75 and 80 individual operations.[2] The chart on page 52 illustrates the entire manufacturing process. This chart is taken from the Manual of Accounting for the Cement Industry prepared and adopted by the Code Authority in 1934.[3]

The following description of the manufacturing process is drawn largely from the testimony of J. F. Magee, Vice President of Alpha in charge of operations, who is a grad-

[11] Royal, Attorney, F.T.C. (C) Tr. 12824-25, 12829.

[12] Id., Tr. 12829.

[13] Warner, Sales Manager, Colorado (C) Tr. 13836-39. Hoenig, Sales Manager, Nebraska (R) Tr. 41959.

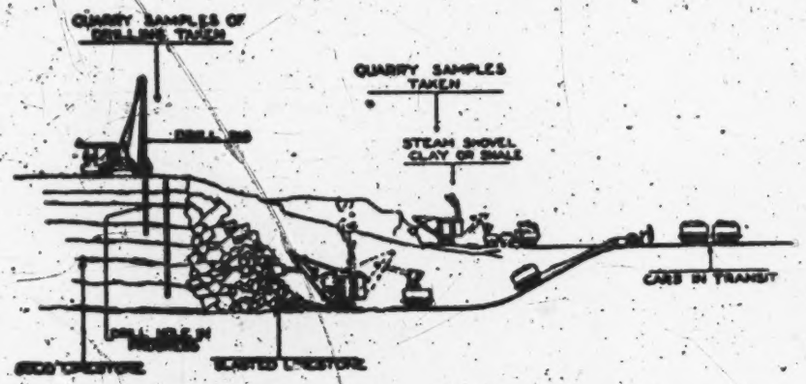
[14] Royal, *supra*, Tr. 12830, 12832.

[1] Resp. Ex. 184, p. 9; Magee, Vice President, Alpha (R) Tr. 22676, 22690-91, 22697, 22754.

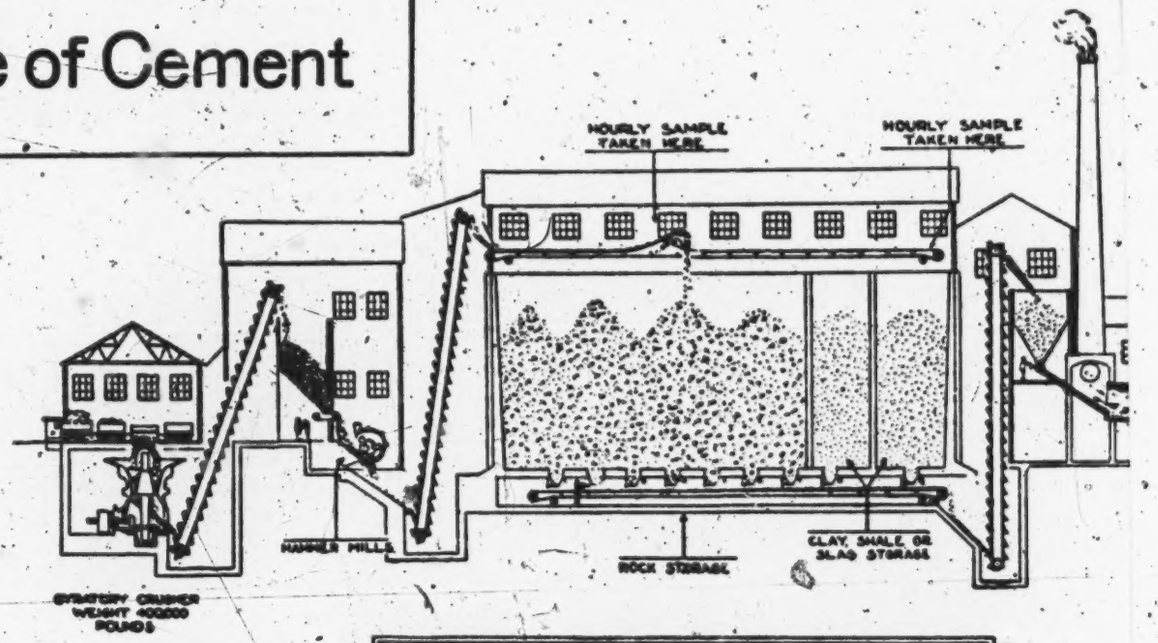
[2] Id., Tr. 22756.

[3] Resp. Ex. 184, p. 9.

Picturing the Manufacture of Cement



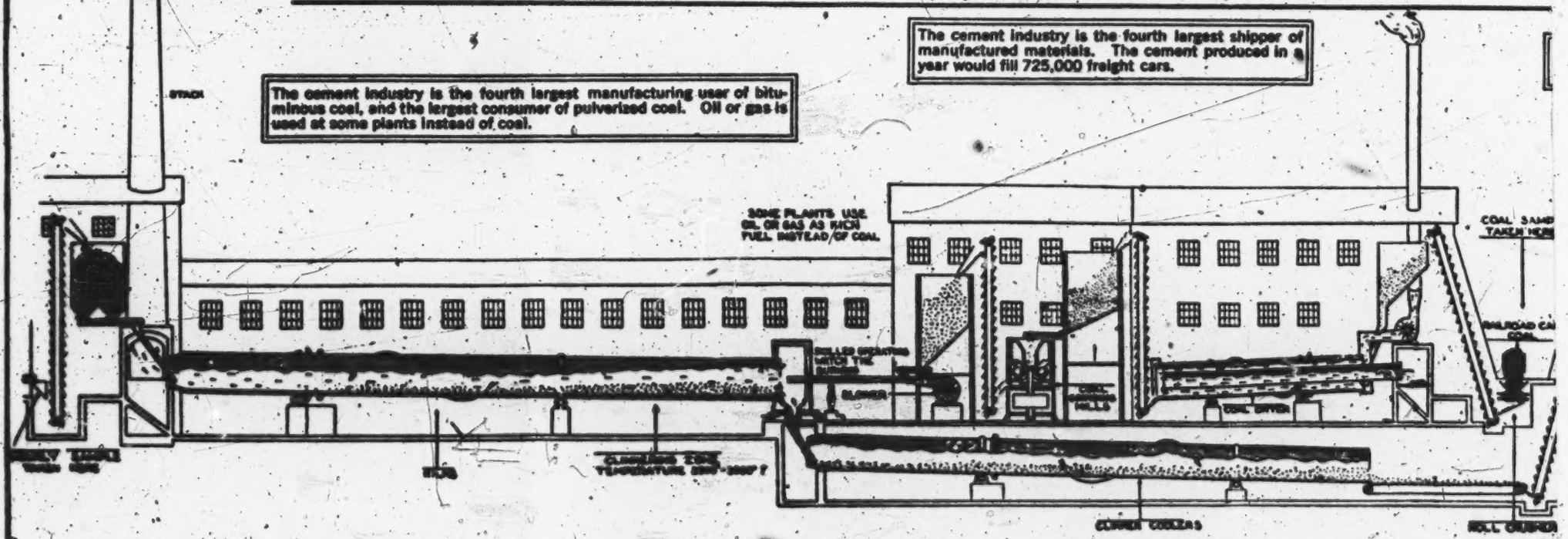
Cement is usually made from limestone and clay, shale or blast furnace slag; or marl and clay. Lime, silica and alumina are the main constituents of cement.



Instead of the materials being dried, in wet process plants water is added. Otherwise, operations are essentially the same as in the dry process plants.

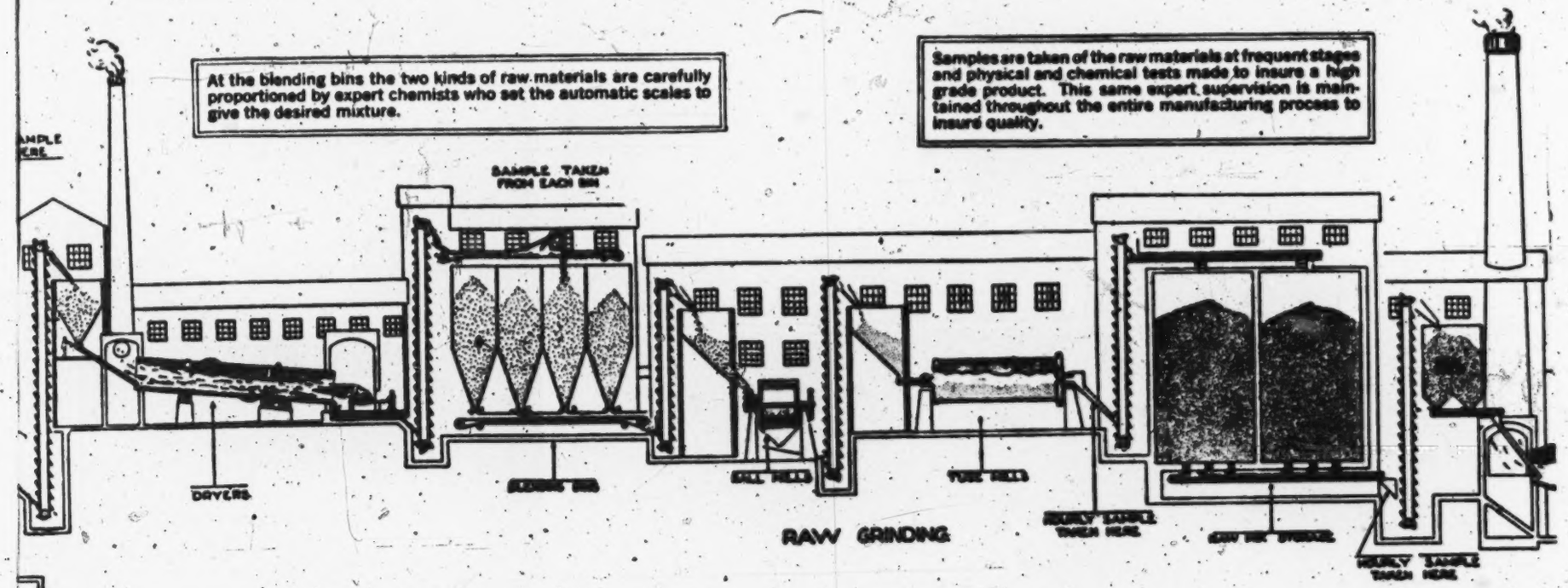
The cement industry is the fourth largest manufacturing user of bituminous coal, and the largest consumer of pulverized coal. Oil or gas is used at some plants instead of coal.

The cement industry is the fourth largest shipper of manufactured materials. The cement produced in a year would fill 725,000 freight cars.



At the blending bins the two kinds of raw materials are carefully proportioned by expert chemists who set the automatic scales to give the desired mixture.

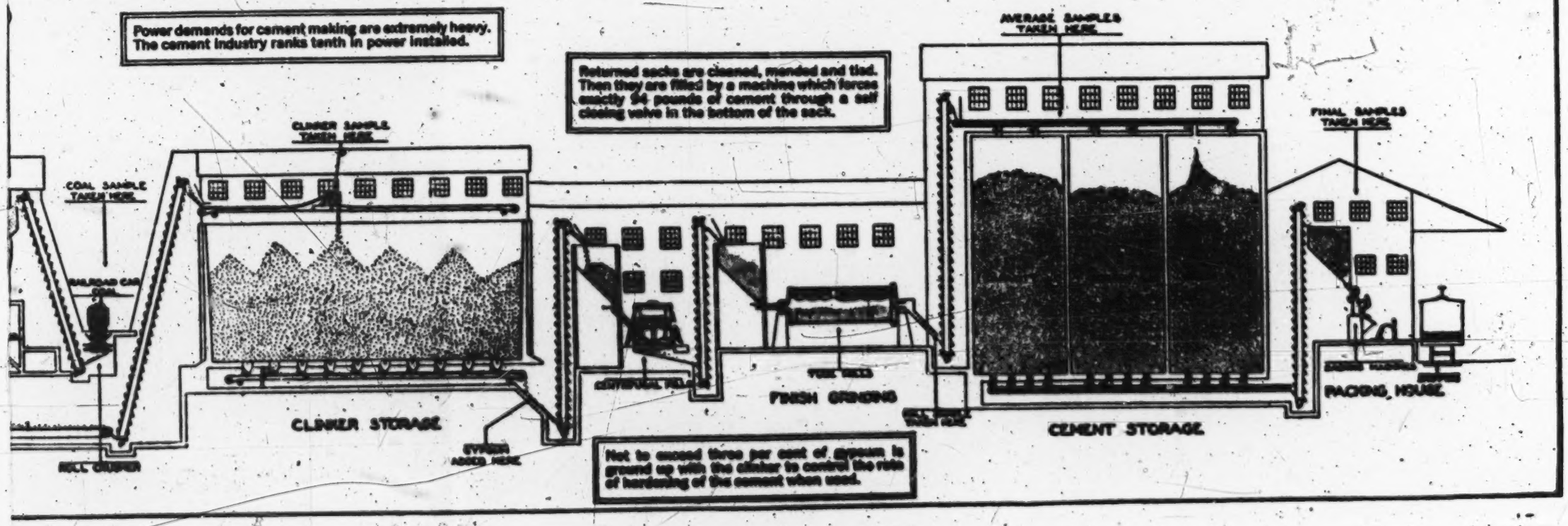
Samples are taken of the raw materials at frequent stages and physical and chemical tests made to insure a high grade product. This same expert supervision is maintained throughout the entire manufacturing process to insure quality.



CONTINUED IN LOWER DIAGRAM

Power demands for cement making are extremely heavy. The cement industry ranks tenth in power installed.

Returned sacks are cleaned, mended and tied. Then they are filled by a machine which forces exactly 94 pounds of cement through a self closing valve in the bottom of the sack.



Not to exceed three per cent of gypsum is ground up with the clinker to control the rate of hardening of the cement when used.

uate mining engineer and a member of the American Institute of Mining and Metallurgical Engineers, experienced in the cement business since 1913.[4]

a. Quarrying:

This operation varies with the character of the rock and its operation, vis-a-vis the ground surface. At one point there may be an open-face quarry from which the rock is blasted after well drills have been driven and loaded with dynamite.[1] At another, a major stripping operation for removal of the top soil may be necessary to reach the rock or there may be surface mining as deep as 500 or 600 feet.[2] Where there are separate rock beds the quarrying must move from one to another.[3] In some instances the rock is harder to drill than in others.[4] At times there are headings in hillsides or the characteristics of the rock may require operations at different levels where high and low grade limestone are sometimes separately found.[5]

b. Crushing:

This operation ordinarily is done in two stages, the first with a gyratory crusher which takes pieces as large as a table and reduces them to a size of 4 to 6 inches, and the second with a gyratory crusher or a hammer mill which further reduces to a size of 1 to 2 inches. Some plants use very large hammer mills in a one stage operation. The size of the crushing apparatus has been increased in the past 25 to 30 years from a capacity of 50 tons an hour to between 400 and 600 tons.[1]

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[4] Magee, Vice President, Alpha (R) Tr. 22506, 22512.

[1] Id., Tr. 22676-78.

[2] Id., Tr. 22608, 22683, 22541-42, 22594-95.

[3] Id., Tr. 22573-74.

[4] Ackerman, Sales Manager, Lawrence (C) Tr. 8211-13.

[5] Magee, *supra*, Tr. 22541-42, 22685-90.

[1] Id., Tr. 22691-92.

c. Raw Grinding:

Before grinding the moisture in the rock is removed in a rotary dryer, a revolving cylinder five or six feet in diameter and forty or sixty feet long, having a temperature of 1000 to 1500 degrees.[1]

Raw grinding is done usually in two stages, the first in either a ball mill or a centrifugal mill and the second in a tube mill. The ball mill is a heavy steel cylinder, from 6 to 8 feet in diameter and from 8 to 12 feet in length, half filled with large steel balls of 3 to 5 inches in diameter which roll over each other and against the heavy sides of the cylinder grinding the clinker. The resultant is pulverized in the tube mill, a revolving steel cylinder from 20 to 40 feet in length and from 6 to 10 feet in diameter, containing smaller steel balls whose operation reduces the material to a fineness of 90 percent passing 200 mesh. The 200 mesh sieve means 40,000 openings to the square inch.[2]

d. Burning (Calcining):

In this operation the moisture is driven off, followed by the carbon dioxide, resulting in a change of the lime and magnesia content from carbonates to oxides. Then the silica and alumina elements are combined with the lime elements.[1] Pulverized coal is used for quicker burning.[2] The principal equipment is the rotary kiln, which is a revolving cylinder varying in size from a diameter of 5 or 6 feet and a length of 40 feet in length. In the older plants they run up to a diameter of 10 or 12 feet and 400 or 500 in length. Kilns of the latter size are among the largest

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[1] Magee, Vice President, Alpha (R) Tr. 22691-92.

[2] Id., Tr. 22697-98, 22700.
Resp. Ex. 399: 200 mesh sieve.
Resp. Ex. 400: Sample of pulverized raw material.

[1] Magee, *supra*, Tr. 22723-24.

[2] Id., Tr. 22716, 22726-27.

pieces of moving machinery in the world. During the burning, temperatures as high as 3000 degrees Fahrenheit are required, sufficient to melt iron and steel.[3]

The calcining results in clinker,[4] which is cooled mechanically within a few hours in preparation for final grinding. Before mechanization was adopted, the cooling required from two to three weeks. It was believed, formerly, that the passage of time had a curative or seasoning effect, but, more recently, this impression has been dispelled by engineers and specifications now often require immediate grinding. Stored clinker has been found to deteriorate and has been reduced to a minimum of about 10% of the cement stock, which minimum is kept for the purpose of flexibility between the burning and the final grinding, so that one operation can continue when the other is shut down.[5] Just before the final grinding, gypsum is mixed with the clinker to retard the setting property of the cement.[6]

d. Final Grinding:

The finish grinding operation, is somewhat similar to the raw grinding operation using big ball mills and tube mills and centrifugal mills, very large equipment requiring large amounts of power. Cement is ground today by all companies to a fineness from 90 percent up to 98 percent, passing through the 200 mesh sieve.[1]

Throughout these four major steps there is frequent sampling, blending of chemical elements and chemical analysis or testing. The first sampling occurs in the quarry.[2] During the crushing operation hourly samples

[3] Magee, Vice President, Alpha (R) Tr. 22724-25.

[4] Id., Tr. 22753.

[5] Id., Tr. 22753, 22656-63, 22704.

[6] Id., Tr. 22543, 22568.

[1] Id., Tr. 22754.

[2] See process chart, p. 52, *supra* (Resp. Ex. 184, p. 9).

are taken and the necessary adjustments made with primary and secondary materials.[3] The final chemical analysis is made in the storage bins before packing.[4]

Among the little known statistics concerning the manufacture of cement are the following: it requires about two years to build a cement plant;[5] in the burning operation the raw material decreases in weight from 625 to 376 lbs.;[6] between 20 and 30 kilowatt hours of electricity and approximately 100 lbs. of coal are consumed per barrel of cement;[7] the industry ranks fourth among the manufacturing users of bituminous coal and tenth in power installed;[8] the finished product passes through a 200-mesh sieve[9] which is, in some respects, finer than a silk handkerchief and through which water will not pass;[10] and air separators are used during the final grinding to improve the efficiency of the grinding operation due to increased fineness requirements of the specifications.[11]

2. Specialized Nature and Cost of Equipment

The highly specialized equipment used in the plants includes, in addition to that already described, such apparatus as dust precipitators for the protection of employees and the surrounding public from a dust nuisance, waste heat

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[3] Magee, Vice President, Alpha (R) Tr. 22692-93.

[4] Magee, *supra*, Tr. 22758, 22760.

[5] Moore, R. W., Vice President, Dewey (R) Tr. 46819.

[6] Magee, *supra*, Tr. 22551-52, 22733-34.

[7] Id., Tr. 22729, 22732.

[8] See process chart, p. 52, *supra* (Resp. Ex. 184, p. 9).

[9] Resp. Ex. 399: Specimen of 200 mesh sieve used in testing Alpha cement.

[10] Magee, *supra*, Tr. 22698-701.

[11] Id., Tr. 22754-55.

boilers which develop power from the exhaust gases of the rotary kilns,[1] steam or electric shovels and gas or electric locomotives for loading and hauling at the quarries,[2] bridge cranes for moving crushed stone,[3] blending tanks which provide a more constant mix and a stronger product, and air conditioning systems.[4] Testimony as to the complete mechanization of a respondent's quarries was excluded.[5]

Executives of various respondents including Federal, Hermitage, Kosmos, Monarch and Petoskey testified that their plant facilities were undergoing constant improvements in order to better the quality of their product, increase efficiency and reduce manufacturing costs.[6] Magee, Vice President of Alpha, estimated that without such improvements manufacturing costs would be 3 or 4 times greater than they are now, although the benefits have been offset largely by increased costs of labor and materials.[7]

The expensive nature of the equipment used was shown by the testimony of several witnesses:

Manley, General Manager of Hawkeye, stated that his company spent over $1,000,000 on modernization, including $277,000 for waste heat boilers, $123,000 for new silos, $121,000 for new quarrying equipment, $166,000 for

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[1] Magee, Vice President, Alpha (R) Tr. 22892-93.

[2] Id., Tr. 22677-79, 22715-16.

[3] Id., Tr. 22696.

[4] Brooke, Vice President, Monarch (R) Tr. 42184.

[5] Elcock, Vice President, Southern States (R) Tr. 37479.

[6] Bates, J. E., Sales Manager, Federal (R) Tr. 30484.
McGovern, Sales Manager, Hermitage (R) Tr. 36100.
Horner, President, Kosmos (R) Tr. 36803-04.
Brooke, *supra*, Tr. 42184.
Lucas, Vice President, Petoskey (R) Tr. 38739.

[7] (R) Tr. 22952, 22955-56.

remodeling its power plant and $116,000 for installation of coal pulverizers.[8]

Bowen, Vice President of Lehigh testified that his company spends an average of $1,000,000 a year on modernization of its various plants such as for complete electrification and installation of waste heat boilers, new storage facilities and new grinding equipment.[9]

Magee of Alpha testified that his company expended the sums of $100,000, $200,000 and $150,000 at its Birmingham, Martin's Creek and Catskill plants, respectively, merely for extension of storage facilities to provide for the increasing demand for tested cement.[10]

Robeson, Vice President of Nazareth, testified that his company invested approximately $3,300,000 in modernization between 1926 and 1931,[11] and Alexander, President of Missouri, testified that his company spent over $2,000,000 for the same purpose in a ten year period.[12]

Counsel for the Commission conceded that technological improvements have been made by respondents and was willing to concede that the improvements have resulted in reduced production costs.[13] The Trial Examiner excluded any further testimony as to the extent of the improvements.[14] This included testimony concerning expenditures ranging from hundreds of thousands to millions of dollars, specifying the nature of the improvements thereby effected, offered on behalf of Northwestern States, Petoskey, Dewey, Glens Falls, Trinity, Signal Mountain, Consolidated, Flor-

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[8] (R) Tr. 41603.

[9] (R) Tr. 26602-04.

[10] (R) Tr. 22669-71.

[11] (R) Tr. 27966.

[12] (R) Tr. 37181-82.

[13] Tr. 22750-53.

[14] Tr. 22766-67.

ida and Peerless.[15] Stricken testimony of W. R. Blair, Sales Manager of Southwestern's El Paso mill, showed, among other things, that labor saving machines such as belt conveyors and gravity methods are employed from the time the raw material is dumped into the rock crusher until it is completely processed and sacked.[16]

3. Production Cost and Plant Investments:

General production costs of cement increased substantially from 1928 to 1937,[1] and in the past 25 years the average cost of labor has increased from 20¢ an hour to 80¢ and from 5¢ per barrel of cement to 14¢.[2] Further evidence as to the increased cost of labor was excluded including comparative wage scales of the early 1900s and of the present day.[3] Other evidence was excluded showing that increases in cement costs since 1933 have been due to increases in wages, materials, equipment and taxes.[4]

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[15] MacDonald, B. A., Vice President, Northwestern States (R) Tr. 36476, stricken at Tr. 36700.

Lucas, Vice President, Petoskey (R) Tr. 38738, stricken at Tr. 38841.

Moore, R. W., Vice President, Dewey (R) Tr. 46886-89.

Titsworth, President, Glens Falls (R) Tr. 47884.

Storey, Vice President, Florida, Trinity & Signal Mountain, President, Consolidated (R) Tr. 47580-81.

Russell, Vice President, Peerless (R) Tr. 34419-20.

[16] (R) Tr. 38965-70, stricken at Tr. 39076.

[1] Ackerman, Vice President, Lawrence (R) Tr. 31180.
Alexander, President, Missouri (R) Tr. 37321-24.

[2] Magee, Vice President, Alpha (R) Tr. 22647-48, 22985-38, 22943-44.

[3] MacDonald, B. A., *supra*, Tr. 36476, stricken at Tr. 36700.

Moore, R. W., *supra*, Tr. 46886-89.

Brobston, President, Hercules (R) Tr. 26321, 26328-29.

[4] Davis, President, Superior (R) Tr. 29610-11.

Fuel costs have increased about 80% in a like period.[5] Some plants located close to good coal fields pay from $2.25 to $2.50 a ton. Others farther away pay much more.[6] Gypsum, of which about 12 pounds is used per barrel of cement, costs from $4 to $6 a ton, depending upon the proximity of the source of supply.[7] Dynamite costs 12¢ a pound and an average of from one-fourth to one-half a pound is used per ton of rock blasted. One respondent uses between 500,000 and 1,000,000 pounds of dynamite annually in its eight plants.[8] High content limestone, of which a single plant may purchase 400 tons daily from outside sources, costs from 60¢ to $2.00 a ton,[9] and alumina-bearing material costs around $1.16 a ton.[10]

These fuel and raw material prices are invariably "delivered prices" of which freight at times represents as much as 50% on coal, 75% on gypsum, from 20% to over 50% on limestone, 66¢ a ton on alumina-bearing material and 15¢ a ton on sandstone, an argillaceous material, for shipments of but ten to twelve miles.[11]

With respect to the cost of producing cement and of constructing a cement plant, the Commission in its main case introduced evidence consisting of estimates made by the Tennessee Valley Authority during its negotiations with certain petitioners located in the southeastern part of the United States. This evidence included testimony of E. C. Eckel, Chief Geologist for T.V.A., that the cost of building

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[5] Magee, Vice President, Alpha (R) Tr. 22638, 22932.

[6] Id., Tr. 22580-85, 22598-99, 22628.
Ackerman, Sales Manager, Lawrence (C) Tr. 8211-13.

[7] Magee, *supra*, Tr. 22575, 22594, 22599, 22612, 22629.

[8] Id., Tr. 22548-49, 22551.

[9] Id., Tr. 22578-79, 22562-63.

[10] Id., Tr. 22615, 22619.

[11] Id., Tr. 22598-99, 22611-12, 22629, 22575-76, 22615-19, 22626.

a cement plant in Puerto Rico would be about $3 per barrel of annual capacity.[12]

Subsequently, after respondents had introduced evidence showing the full details of the negotiations with T.V.A., counsel for the Commission obtained leave to withdraw its evidence on the subject, including the testimony of Eckel above-described, and moved to strike all related evidence which had been received on behalf of respondents.[13] The Trial Examiner granted the Commission's motion and ruled that he would "eliminate the cost matter entirely from here on and from here back."[14]

Thereafter all evidence on behalf of respondents on the subject of costs and profits and the fairness of cement prices was excluded. This included an offer of proof through C. F. Lewis, Manager and Assistant-Treasurer of Volunteer, who had been employed by the federal government as a consultant on the aforesaid Puerto Rico plant, that the final total construction cost of the plant was between $3.50 and $4 per barrel of annual capacity.[15]

Respondents have moved herein to adduce their excluded evidence with respect to costs and fairness of price[16] including the testimony of C. F. Lewis described above,[17] a survey made by Messrs. Ford, Bacon & Davis as of January 1, 1938, showing the reproduction cost new of 121 plants of 50 corporate respondents to be $441,236,650,[18]

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[12] (C) Tr. 2616, stricken at Tr. 33889.

[13] Tr. 32929-36, 33889.

[14] Tr. 33959-60.

[15] (R) Tr. 31367-73.

[16] See Motion For Leave To Adduce Additional Evidence dated March 15, 1944, particularly subject XIV, at pp. 48-60 of supporting affidavit of George S. Leisure.

[17] O.P. at Tr. 31872-73.

[18] Schultz, Senior Engr., Ford Bacon & Davis (R) O.P. at Tr. 47519-23.

a survey made by Messrs. Price, Waterhouse & Co., showing that the net investment of the same 50 respondents was $137,213,236, as of December 31, 1937, and that their net earnings from 1928 to 1937 averaged 2.99% after deduction of federal taxes, and 3.56% before deduction of such taxes,[19] together with cost analyses and other data relating to the proposed T.V.A. plant showing the cost to respondent Volunteer of manufacturing cement for T.V.A., the increase in labor, supply and operational costs due to the N.R.A. program and the cost of construction of and production by the proposed T.V.A. plant.[20]

F. Factors Controlling Locations of Plants.

R. W. Moore, a director and Vice President of Dewey, testified that when the Davenport, Iowa, plant of his company was constructed in 1926-27, the factors considered in building there were as follows:

> "One: The market available. Second: Supply of raw materials. * * * Third: location on the Mississippi River, which gave us a splendid water supply. Fourth: potential transportation facilities by river. * * * Fifth: location on two large railroads. * * * Sixth: the close proximity to a large consuming area * * * comprising three large cities * * * and * * * the fact that throughout that territory * * * the Interstate Commerce Commission had established a uniform basis of freight rates on cement. * * *"

He testified also that at the time demand for cement in the area was exceptionally good and on the increase. Further

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[19] Lothrop, Accountant, Price Waterhouse (R) O.P. at Tr. 47470-99.

[20] Resp. Exs. 2194-95 id., 2202 id. (stricken at Tr. 32959-60). Lewis, Manager, Volunteer (R) Tr. 31433-50, 31478-504, 31515-71, 31587-649, 31657-64, 31668-69, 31676-81, 31693-98 (stricken at Tr. 32959-60).

testimony of the same witness that the plant was situated near a very large coal field in Illinois was excluded.[1]

The evidence concerning the plant locations of many other respondents, referred to below, shows that the foregoing considerations are typical and that the three principal elements, namely, (1) demand, (2) proximity and access to markets and (3) availability of raw materials and fuel have had a controlling influence. There is testimony that no site will satisfy all the desired requirements but most often one advantage offsets another as where a good location market-wise is a poor location with respect to raw materials and fuel or a good location with respect to raw materials involves high priced fuel, requiring a constant balancing of advantages.[2]

1. Demand

The westward expansion of the industry from the Lehigh Valley was due largely to increasing demand in that region as shown, *supra*, at pp. 44 *et seq.* Other examples of increasing mills in response to demand follow: Northwestern States purchased its Gilmore City, Iowa plant in 1926 when demand there was good.[1] Alpha purchased its Manheim, West Virginia plant when it had a very large business in the central west.[2] Keystone was organized in 1926-1927 and its plant built in eastern Pennsylvania at a time of very brisk demand in the north-eastern states. Some shipments to that sector were being made from as far west as Missouri.[3] North America acquired its Catskill,

[1] (R) Tr. 46830-34.

[2] Lewis, Manager, Volunteer (R) Tr. 31378-80.
Magee, Vice President, Alpha (R) Tr. 22643-45, 22912-14.
Russell, Vice President, Peerless (R) Tr. 34184.

[1] MacDonald, B. A., Vice President, Northwestern States (R) Tr. 36475.

[2] Coogan, Vice President, Alpha (R) Tr. 23031.

[3] Scott, H. M., President, Keystone (R) Tr. 27333-34, 27346.

New York plant because its other plants were unable to meet the demand in the adjacent area during the peak months of the year.[4] Lehigh built a second plant at Mitchell, Indiana, in 1906 because its existing plant there was unable to meet the demand. So great was the demand in the middle west that the same company, a short time later, purchased another plant at Wellston, Ohio, and constructed two new plants at Ormrod, Pennsylvania.[5] Similar considerations affected the locations of Lawrence at Thomaston, Maine, and of Cumberland at Cowan, Tennessee.[6] Evidence as to the influence of demand on the location of Dewey's Oklahoma plant in 1906-1907 was excluded.[7]

2. Proximity and Access to Markets

This factor reduces the cost of transporting the finished product[1] and speeds up customer service.[2] Lawrence with mills in Siegfried, Pennsylvania and Thomaston, Maine had to abandon its markets in the District of Columbia, western New York and Pennsylvania and regions further west because its competitors were able to give lower prices and overnight service on shipments for which it required up to a week. But the same respondent had some advantage in this respect over its competitors in New England.[3] Robeson, Vice-President of Nazareth, testified that his company lost former customers through inability to render overnight service.[4] Executives of nine

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[4] Porter, President, North American (R) Tr. 33759, 33764-65.

[5] Bowen, Vice President, Lehigh (R) Tr. 26575-78.

[6] Ackerman, Sales Manager, Lawrence (C) Tr. 8229.
Pearson, Secretary-Treasurer, Cumberland (R) Tr. 39922.

[7] Moore, R. W., Vice President, Dewey (R) Tr. 46820-23.

[1] Russell, Vice President, Peerless (R) Tr. 34184.

[2] Ackerman, *supra*, Tr. 31188-89.

[3] Id., Tr. 31188-89.

[4] (R) Tr. 27979-80.

other respondents testified that available markets and transportation facilities with which to reach those markets were considered in their selection of plant sites.[5] [The facts with respect to the limited marketing areas around cement mills are set out separately herein at pp 87 *et seq.*, *infra.*]

3. Availability of Raw Materials and Fuel

The plants of most respondents are located at the quarries from which they obtain their rock supply,[1] although

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[5] Porter, President, North American (R) Tr. 33757-59.
Manley, General Manager, Hawkeye (R) Tr. 41601.
Scott, H. M., President, Keystone (R) Tr. 27345-46.
Coogan, Vice President, Alpha (R) Tr. 23031, 23035, 23038-39.
MacDonald, B. A., Vice President, Northwestern States (R) Tr. 36475.
Brooke, Vice President, Monarch (R) Tr. 42183.
Gay, General Manager, Santa Cruz (R) Tr. 42860-62.
Hoenig, Sales Manager, Nebraska (R) Tr. 41960-61.
Hanahan, President, Volunteer (R) Tr. 38626.

[1] Magee, Vice President, Alpha (R) Tr. 22583-84, 22594-95, 22625.
Brobston, President, Hercules (R) Tr. 25974.
Bowen, Vice President, Lehigh (R) Tr. 26600.
Scott, *supra*, Tr. 27345-46.
McKee, Vice President, West Penn (R) Tr. 27844.
Robeson, Vice President, Nazareth (R) Tr. 27957, 27966.
Elliott, Vice President, Whitehall (R) Tr. 28474.
Lewis, Manager, Volunteer (R) Tr. 31380-81.
Warren, F. B., Vice President, Bessemer (R) Tr. 32047.
Porter, *supra*, Tr. 33745-46, 33757-59.
MacDonald, *supra*, Tr. 36475-76.
Letzkus, Sales Manager, Pittsburgh (R) Tr. 37683.
Lucas, Vice President, Petoskey (R) Tr. 38698.
Blair, W. R., Sales Manager (El Paso), Southwestern (R) Tr. 38925.
Dannelly, Vice President, National (R) Tr. 39531.
Pearson, Secretary-Treasurer, Cumberland (R) Tr. 39813.
Hoenig, *supra*, Tr. 41960.
Gay, General Manager, Santa Cruz (R) Tr. 42860.
Sunderland, President, Ash Grove (R) Tr. 47632.
Blum, President, Coplay (R) Tr. 48098.

there are exceptions such as the Buffington mill of Universal Atlas, 40% of whose raw material is slag from steel mills, and other mills near the Great Lakes which transport their raw materials by water.[2] Magee, Vice President of Alpha, testified that the reason for locating at the quarry is that "to ship 600 pounds of raw material to a market * * * would (cost) more than shipping 376 pounds (the weight of a barrel of cement)."[3] The raw materials required in the manufacture of cement can seldom be discovered near the major points of consumption.[4] Since the rock supply is the chief raw material the quarry site is prospected in advance,[5] sometimes through drilling as deep as 2,000 feet.[6] Respondents have supplies estimated by geologists at from 40 to 500 years' duration.[7] Occasionally the rock supply is or becomes deficient in some of the required elements such as lime or alumina. At times it is possible to obtain the deficient material nearby although it may be necessary to bring it from a source 100 miles away with increased cost of transportation.[8]

Many cement mills are located close to sources of fuel. There are five or six in the bituminous coal district around

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[2] Magee, Vice President, Alpha (R) Tr. 22913.
Bowen, Vice President, Lehigh (R) Tr. 26600.

[3] (R) Tr. 25982.

[4] Fry, Purchasing Officer, U. S. Dept. of Interior (C) Tr. 208-10.

[5] Porter, President, North American (R) Tr. 33745-46, 33759.

[6] Brobston, President, Hercules (R) Tr. 25977-79.

[7] McKee, Vice President, West Penn (R) Tr. 27844.
Elliott, Vice President, Whitehall (R) Tr. 28474.
Moore, R. W., Vice President, Dewey (R) Tr. 46831.
Scott, H. M., President, Keystone (R) Tr. 27345-46.
Wood, General Manager, Green Bag, W. Va. (R) Tr. 29876.

[8] Magee, *supra*, Tr. 22535, 22553, 22556, 22560-61, 22570-72.
Horner, President, Kosmos (R) Tr. 36803.

Birmingham, Alabama,[9] and many others near the mines of West Virginia, Eastern Kentucky[10] and Pennsylvania.[11] Several are in the so-called "gas-belt" in southeastern Kansas.[12] But others have to obtain their coal or gas from as far distant as 400 or 500 miles.[13] A nearby fuel supply may be low grade and freight rates may permit obtaining a better grade at a distance or a nearby supply may be temporarily shut down.[14] Some mills have changed from coal to gas and back again or have purchased all their power from public utilities, varying with considerations of economy and efficiency.[15] Further evidence to the same effect was excluded.[16]

Ordinarily gypsum has to be obtained from a distance. For a long time it was imported mainly from Nova Scotia but deposits later were found in a few states such as New York, California, Texas, Oklahoma, Kansas, Iowa and Michigan.[17]

4. Other Factors

Other factors which have entered into the locations of plants are the competitive element, where plants are lo-

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[9] Magee, Vice President, Alpha (R) Tr. 22625, 22628.

[10] Id., Tr. 22585, 22596-98.
Horner, President, Kosmos (R) Tr. 36803.

[11] Ackerman, Sales Manager, Lawrence (C) Tr. 8211.

[12] Brooke, Vice President, Monarch (R) Tr. 42183.
Cf. also, Sunderland, President, Ash Grove (R) Tr. 47632.
Storey, Vice President, Florida, Trinity & Signal Mountain, President, Consolidated (R) Tr. 47582-83.

[13] Magee, *supra*, Tr. 22580, 22621, 22634-35.

[14] Id., Tr. 22597, 22611-12.

[15] Id., Tr. 22620-22, 22638.

[16] Moore, R. W., Vice President, Dewey (R) Tr. 46834-35.

[17] Magee, *supra*, Tr. 22545-46.
Warren, F. B., Vice President, Bessemer (R) Tr. 32047.
Hoenig, Sales Manager, Nebraska (R) Tr. 41960.

cated in order to hold business against new competitors,[1] and the protective tariff which existed against foreign cement.[2]

Executives of three respondents testified that their plant locations had no relation to the existence or use of any system of pricing:

Hanahan, President of Volunteer, testified his company gave no consideration whatsoever to the existence of the so-called basing-point method of marketing.[3]

Pearson, Secretary-Treasurer of Cumberland, testified that at the time the company decided to build, not only was no consideration given to pricing methods but he did not know there was a so-called basing-point method.[4]

Porter, President of North American, testified that its property was not acquired with a view to taking advantage of any pricing method.[5]

Early in respondents' case the Trial Examiner ruled that he would receive no further evidence with respect to the advantageous or disadvantageous location of particular mills.[6] Testimony as to the economical location of respondents' plants likewise was excluded.[7]

G. Capacity, Production and Shipments.

1. Statistics of Capacity, Production and Shipments:

During the period from the inception of the industry until 1902 annual production increased to over 17,000,000

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[1] Bowen, Vice President, Lehigh (R) Tr. 26589.

[2] Ackerman, Sales Manager, Lawrence (C) Tr. 8229.

[3] (R) Tr. 38625-26.

[4] (R) Tr. 39899.

[5] (R) Tr. 33759.

[6] Tr. 32048.

[7] Tr. 31209-10, 33756.

barrels.[1] By 1913 it had reached over 92,000,000 barrels.[2] Annual production, in barrels, from 1913 to 1937 rose to a peak of 176,298,846 barrels in 1928, after which it tapered off to slightly over 63,000,000 barrels in 1933, and then rose again to 116,000,000 barrels in 1937.[3] Figures for the country as a whole from 1913 to 1937 are as follows:

Portland Cement, 1913-1937[4]

	Capacity	Production	Shipments
1913	115,000,000	92,097,131	(not available)
1914	115,000,000	88,230,170	"
1915	129,800,000	85,914,907	"
1916	133,679,650	91,521,198	"
1917	136,750,322	92,814,202	"
1918	137,601,200	71,081,663	"
1919	134,092,700	80,777,935	"
1920	146,400,000	100,023,245	96,311,719[5]
1921	144,354,000	98,842,049	95,507,471[5]
1922	146,203,000	114,789,984	117,701,216[5]
1923	161,858,000	137,460,238	135,912,118[5]

[1] Resp. Ex. 411, pp. 449-50: Lesley on Statistics of the Cement Industry.

[2] Resp. Ex. 3508: Chart of Portland Cement Statistics, U. S. Bureau of Mines, 1913-1937.

[3] Id.

[4] Resp. Exs. 3661, 3769-81.

[5] This figure is computed by adding the separate totals of shipments in each of the 12 Bureau of Mines Districts contained in Resp. Ex. 3661. Nationwide totals for the years 1924-1937 are contained in Resp. Exs. 3769-81.

	Capacity	Production	Shipments
1924	175,100,000	149,358,109	146,047,549
1925	193,558,000	161,658,901	157,295,212
1926	215,300,000	164,530,170	162,187,090
1927	227,080,000	173,206,513	171,864,728
1928	243,702,000	176,298,846	175,838,332
1929	258,917,000	170,646,036	169,868,322
1930	270,044,000	161,197,228	159,059,334
1931	271,850,000	125,429,071	127,150,534
1932	271,308,000	76,740,945	80,843,187
1933	269,387,000	63,473,189	64,282,756
1934	262,709,000	77,747,765	75,901,279
1935	261,915,000	76,741,570	75,232,917
1936	255,504,000	112,649,782	112,849,979
1937	255,223,000	116,174,708	113,804,782

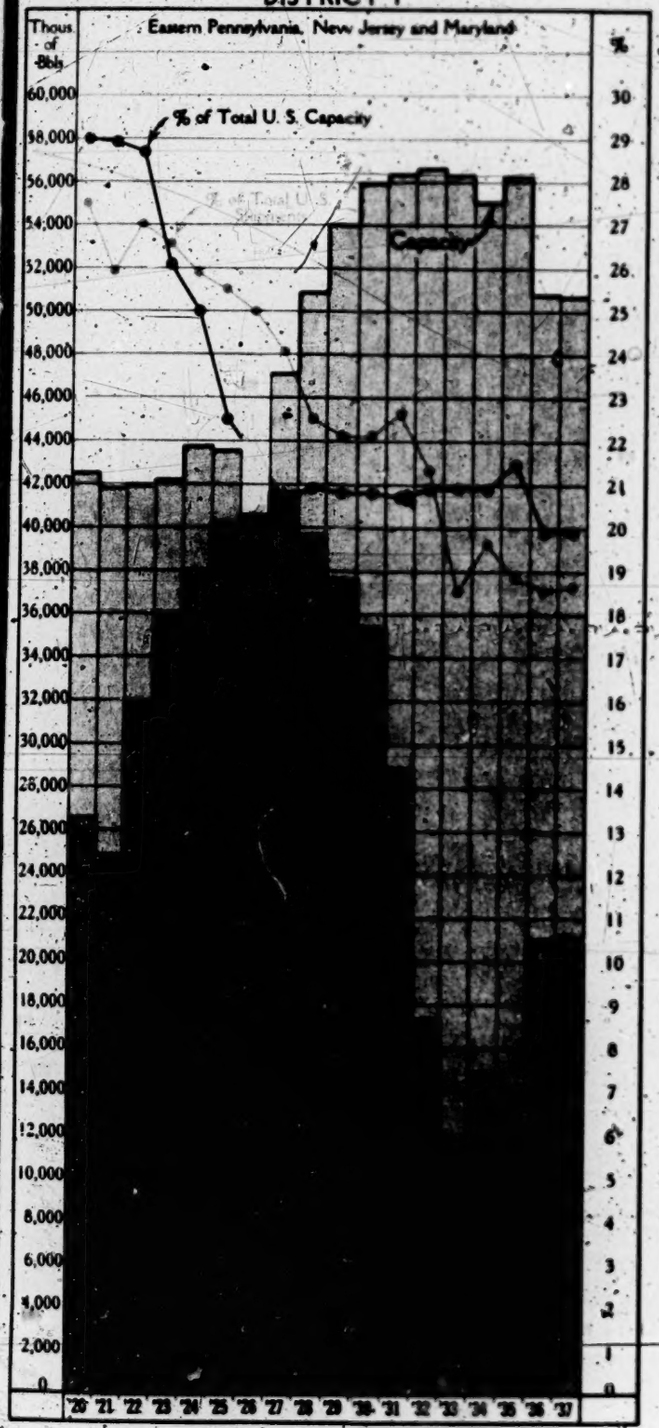
Chart I-F on page 71 shows the above figures of productive capacity (estimated by the Bureau of Mines) and shipments by the twelve Bureau of Mines Districts and also shows in the black and green dotted lines the percentage which the capacity and shipments of each District is to total United States capacity and shipments.

2. Theoretical vs. Practical Capacity and Effect of Increased Specifications

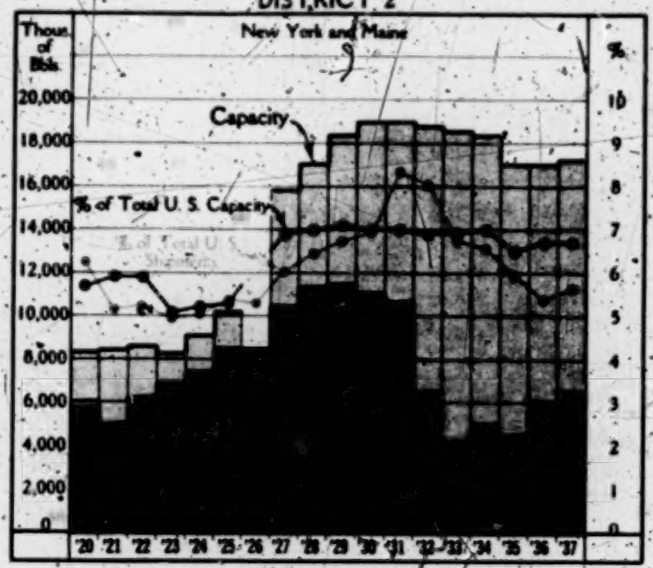
There is a substantial difference between theoretical and practical capacity. W. S. Mallory, Statistician for the Institute from 1933 on, estimated that due to shutdowns, repairs and similar causes the practical capacity of the industry in 1934 was but 82% of its theoretical ca-

SOURCE RESP EX 3661, U S BUREAU OF MINES MINERALS YEARBOOKS

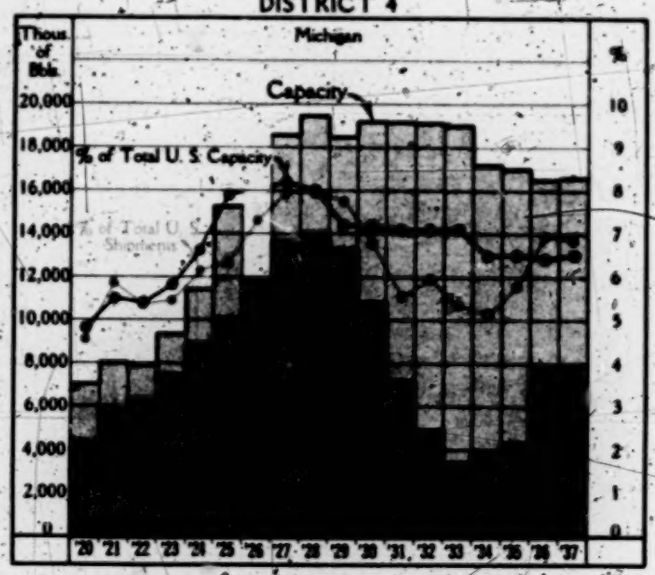
DISTRICT 1



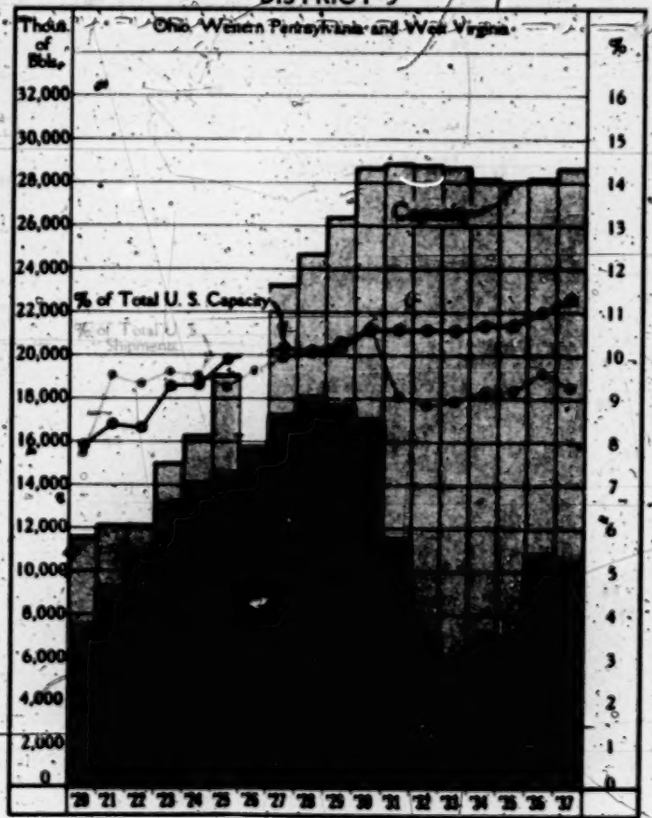
DISTRICT 2



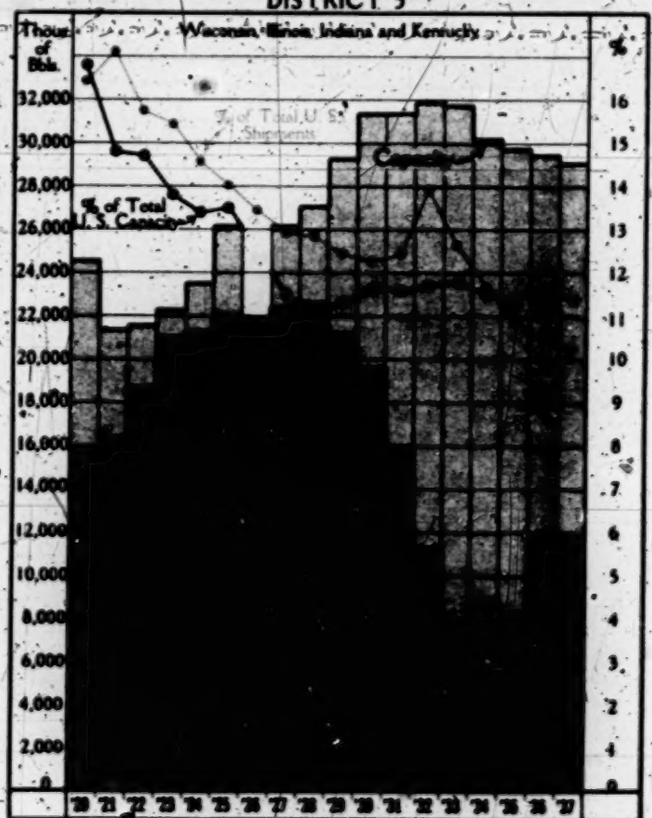
DISTRICT 4



DISTRICT 3

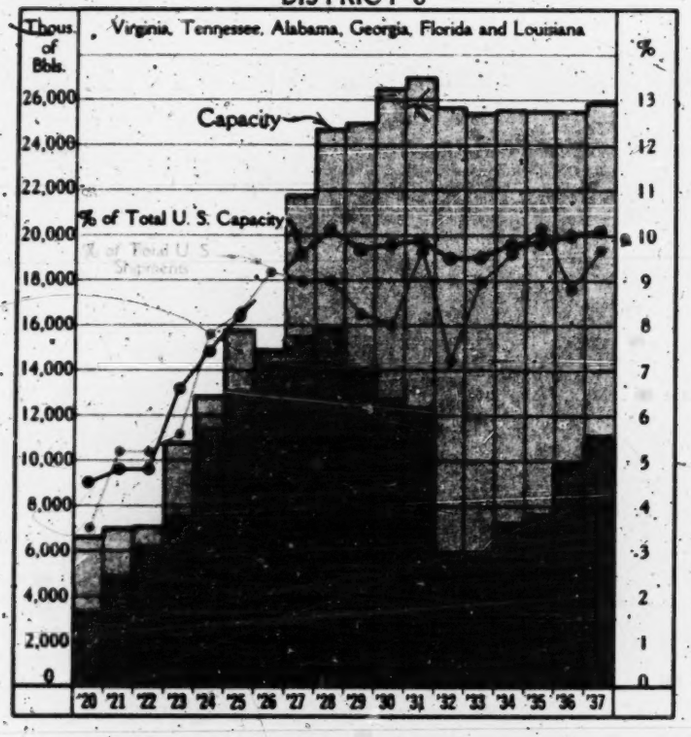


DISTRICT 5

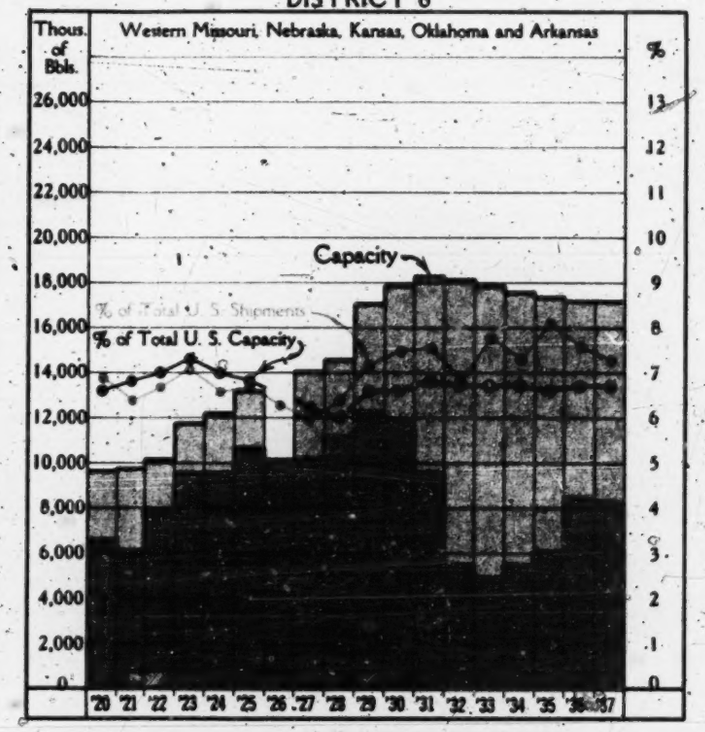


SOURCE: RESP. EX. 3661, U. S. BUREAU OF MINES MINERALS YEARBOOKS

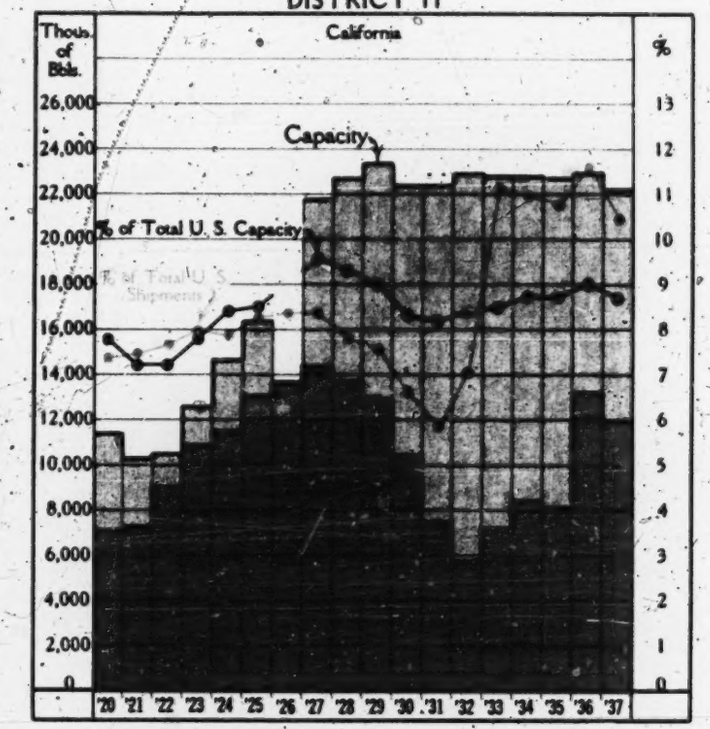
DISTRICT 6



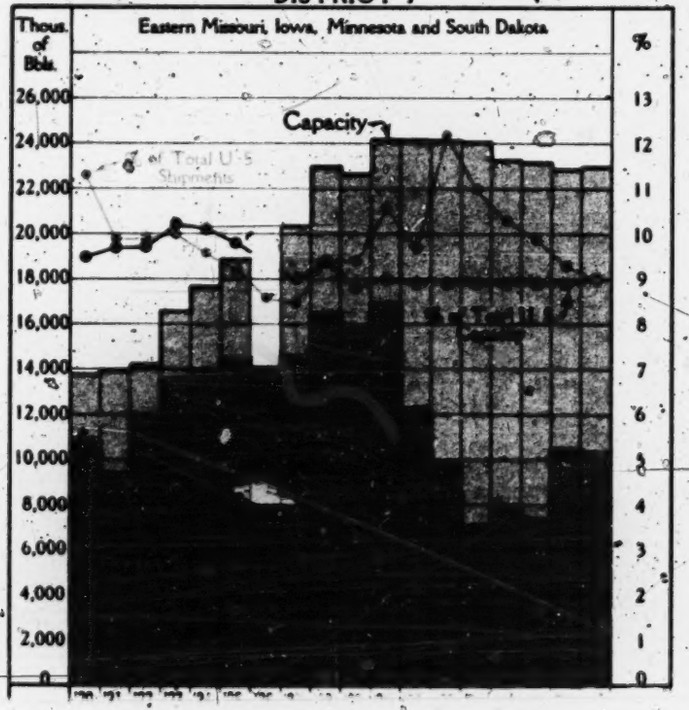
DISTRICT 8



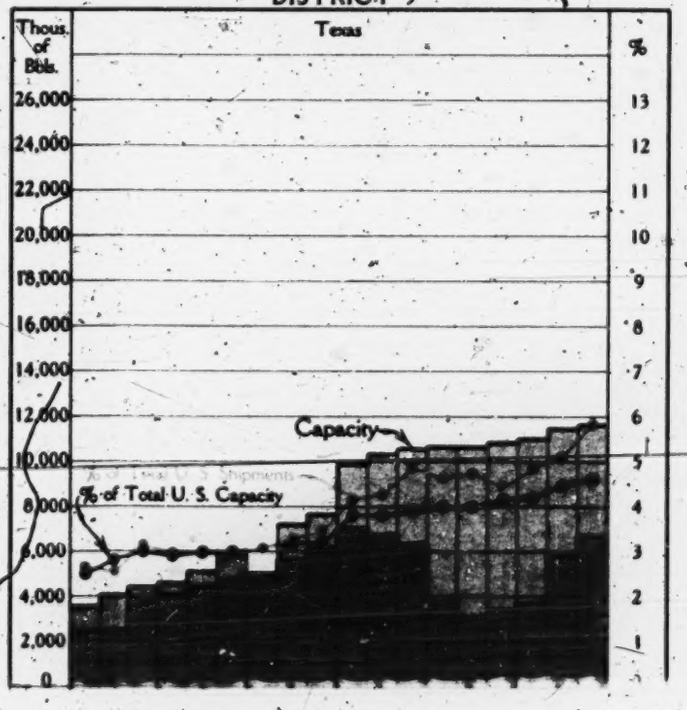
DISTRICT 11



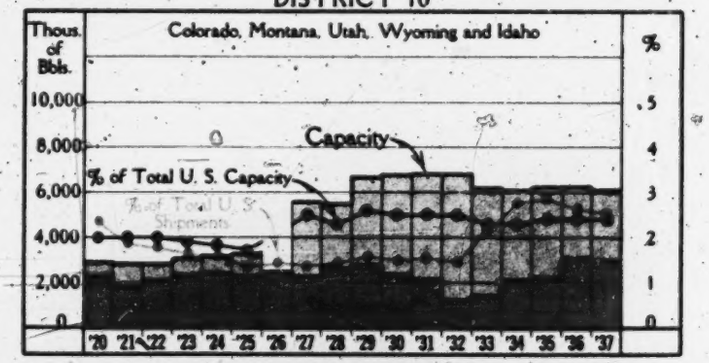
DISTRICT 7



DISTRICT 9

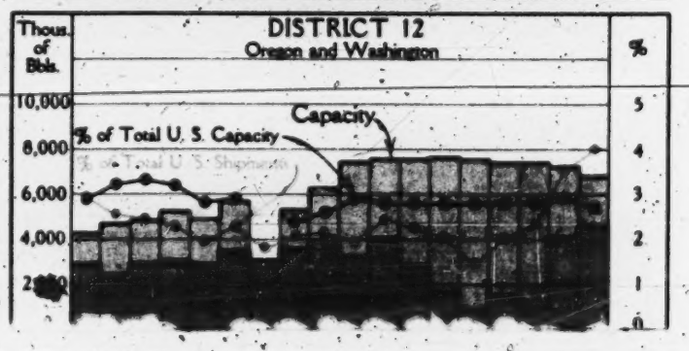


DISTRICT 10



DISTRICT 12

Oregon and Washington



pacity,[1] or approximately 47 million barrels less than the total of 262,709,000 shown in the preceding tabulation. On another occasion he estimated the difference to be 20% less than theoretical capacity.[2] In 1936 Affleck, President of Universal Atlas, while testifying before a Congressional committee, estimated that practical capacity was between 20 and 30 million barrels less than theoretical.[3] The precise difference is difficult to estimate because of the many variable factors involved.[4] Some mills operate all but one kiln when in full production.[5] Production and shipment figures may be misleading because by shipping out of inventory it is possible to ship more in a given year than is produced.[6]

The recurring higher standard specifications[7] have substantially reduced the original or adjusted capacities of most mills. Brobston, President of Hercules, testified that it would be impossible under present specifications for the mills located within Bureau of Mines Districts 1 and 2 to ship the 52 million barrels which they shipped in 1926.[8] The harder burning now required has reduced the kiln output and the finer grinding has reduced the output of the finishing mill.[9] Magee, Vice President of Alpha in charge

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[1] Com. Ex. 2892 B: Letter to H. M. McGill, President, McGill Commodity Service, Inc., dated Mar. 19, 1935.

[2] Resp. Ex. 3751: Letter to W. S. Speed, President, Louisville Cement Co., dated April 30, 1934.

[3] Com. Ex. 2878 J.

[4] Porter, President, North American (R) Tr. 33766-67.

[5] Brobston, President, Hercules (R) Tr. 26234.

[6] Mallory, Statistician, Cement Institute (C) Tr. 17420-30.
Bates, J. E., Sales Manager, Federal (R) Tr. 30483-86.

[7] See p. 21, *supra*.

[8] (R) Tr. 26248-49.

[9] Porter, *supra*, Tr. 33766-67.
Elliott, Vice President, Whitehall (R) Tr. 28478-79.

of operations, estimated that increased specifications have reduced its capacity to 90%.[10]

3. Expansion and Contraction of Capacity Production and Shipments:

Expansion up to 1920

As shown by the tabulation (p. 71, *supra*) over one-half of the 1937 capacity of the industry had been developed prior to 1920. In the period from 1914 to 1918 annual production remained constant at about 90,000,000 barrels. At the same time capacity was increased by over 20,000,000 barrels to a total of almost 138,000,000. In 1918 and 1919 production decreased sharply with a decrease of 20,000,000 barrels in 1918. During the first World War and for a short time thereafter the War Industries Board exercised control over the industry and there were a great many restrictions on the use of cement.[1]

4. Influence of Demand in 1920s: New Plants and Plant Improvements

Commission's counsel admitted as a matter of general knowledge that throughout the 1920s almost all industries, including the cement industry, showed sharply increasing demands for their products.[1] At the outset of this period there was a serious shortage of cement and of the cars with which to ship it and it was necessary for the producers to ration among customers.[2] A principal cause for the in-

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[10] (R) Tr. 22649-51.

[1] Gay, General Manager, Santa Cruz (R) Tr. 8615.
George, General Manager, Henry Cowell Lime & Cement Co. (C) Tr. 8785-86.
Bowen, Vice President, Lehigh (R) Tr. 26700.

[1] Tr. 37179.

[2] Russell, Vice President, Peerless (R) Tr. 34168-69.
Bowen, *supra*, Tr. 26700.
Nelson, J. L., Vice President, Wolverine (R) Tr. 36044-45.

creased demand was the tremendous development of highway construction.[3]

There is testimony by manufacturers from all sections of the country with respect to the direct connection between this greatly increased demand and their new mill construction and alterations and improvements in existing facilities which increased their productive capacity.[4] There is testimony also that the increased capacity was due substantially to such alterations and improvements, and that frequently such was the only type of increase.[5] Further evidence concerning this type of increase was excluded.[6]

Respondents who operated their mills at or close to capacity during the 1920s included the following: South-

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[3] Bowen, Vice President, Lehigh (R) Tr. 26700.

[4] Blair, W. R., Sales Manager (El Paso) Southwestern (R) Tr. 38926-27.
Moore, R. W., Vice President, Dewey (R) Tr. 46731-32, 46830-31.
Russell, Vice President, Peerless (R) Tr. 34168-69.
Lucas, Vice President, Petoskey (R) Tr. 38689-90.
Browder, Traffic Manager, Penn-Dixie (R) Tr. 38133-35.
Porter, President, North American (R) Tr. 33761-62.
MacDonald, B. A., Vice President, Northwestern States (R) Tr. 36475.
Ackerman, Sales Manager, Lawrence (C) Tr. 7114, 8210.
Bowen, *supra*, Tr. 26583, 26700-02.
Scott, H. M., President, Keystone (R) Tr. 27333-34.
McKee, Vice President, West Penn (R) Tr. 27667, 27669, 27672.
McGovern, Sales Manager, Hermitage (R) Tr. 36100.

[5] Twamley, Vice President, Coplay (C) Tr. 6742.
Blum, President, Coplay (R) Tr. 48100.
Thompson, Sales Manager, Oklahoma & Arkansas (R) Tr. 46564-66.
Brooke, Vice President, Monarch (R) Tr. 42184-86.
McGovern, *supra*, Tr. 36100.
Blair, W. R., *supra*, Tr. 38926-27.

[6] Horner, President, Kosmos (R) Tr. 36848-49.

western,[7] North American,[8] Southern States,[9] Lawrence,[10] Hawkeye,[11] Nazareth,[12] Alpha,[13] Dewey,[14] Arkansas and Oklahoma.[15] Keystone and West Penn produced approximately 70% of their capacity between 1927 and 1929,[16] and Whitehall produced approximately 80% of its capacity in 1927 and 1928.[17]

It was conceded by Commission's counsel that every increase in capacity of an existing mill and the construction of every new mill was not due to any arbitrary reasons or agreement but to the owner's belief in the existence of sufficient demand and opportunity for disposing of the increased output.[18]

The Statistician Mallory stated that the peak demand for cement which occurred from 1927 to 1929 when shipments amounted to 170 million barrels or more annually (Tabulation, *supra*, p. 71), could not have been met if capacity had not been increased as it was from 1925 to 1927.[19] The Tabulation also shows that at no time prior to 1925 was

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[7] Blair, W. R., Sales Manager (El Paso) Southwestern (R) Tr. 38926-27.

[8] Porter, President, North American (R) Tr. 33759.

[9] Elcock, Vice President, Southern States (R) Tr. 37560-61.

[10] Ackerman, Vice President, Lawrence (R) Tr. 31182-83.

[11] Manley, General Manager, Hawkeye (R) Tr. 41604-05.

[12] Robeson, Vice President, Nazareth (R) Tr. 27972-73.

[13] Magee, Vice President, Alpha (R) Tr. 22929-30.

[14] Moore, R. W., Vice President, Dewey (R) Tr. 46730-31.

[15] Thompson, Sales Manager, Oklahoma & Arkansas (R) Tr. 46566.

[16] Resp. Exs. 1369, 1418.

[17] Elliott, Vice President, Whitehall (R) Tr. 28481.

[18] (R) Tr. 36866, 37178, 38690.

[19] Resp. Ex. 3751: Letter dated 4/30/34, Mallory to Speed, President, Louisville.

even the theoretical capacity of the industry equal to the amount produced or shipped in 1928. Any surplus capacity which exists was inevitable and the concomitant of the expansion in the industry.[20] Brobston, President of Hercules, who has been in the cement business for over 40 years,[21] testified that there is no reason to believe any excess is permanent.[22] John Treanor, former President of Riverside, now deceased, described the surplus capacity of the industry as a "stand-by" which serves a useful purpose in the economy of the nation and he estimated that in order to meet the fluctuations in demand (described below) such surplus adaptability is required in an amount varying from 15% to 30%.[23] During the hearings the Trial Examiner said it had been shown by dozens of witnesses that a certain amount of over-capacity was necessary.[24]

5. Influence of Depression in 1930s

The effects of the depression were felt heavily in the cement industry beginning in 1931 and its depths were reached in 1933 when production amounted to little more than 63 million barrels, over 110 million less than in 1928 (See Tabulation, *supra*, p. 71). The statistician Mallory stated that reports of cement companies showed the industry lost $40,200,000 in 1931 and 1932 alone.[1] In keeping with this condition, the evidence shows that only 2 of the cement plants which were in existence in 1937 were con-

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[20] Com. Ex. 553-3,B: Letter dated 3/5/34, Treanor, Riverside to Kilgore, Wall St. Journal.

[21] (R) Tr. 25995.

[22] (R) Tr. 26248-49.

[23] Com. Ex. 553-3 A: Letter to B. Kilgore, Wall Street Journal, dated Mar. 5, 1934.

[24] (R) Tr. 37764.

[1] Com. Ex. 2892 A: Letter to H. M. McGill. President McGill Commodity Service, Inc., dated Mar. 19, 1935.

structed after 1929.[2] From its peak in 1931 until 1937 capacity was reduced steadily by almost 17 million barrels (See Tabulation, *supra*, p. 69).

The contraction in the industry since the depression is exemplified by the following: In 1937 Dewey found that but 5 plants were still operating in the Kansas "gas belt" out of 12 with which it previously had competed,[3] and the same respondent made no increase in its own capacity after 1925.[4] Six mills discontinued operations in Michigan between 1931 and 1936.[5] Northwestern States has not operated its plant at Gilmore City, Iowa since 1930.[6] Alpha's operations at its Birmingham, Alabama plant were reduced to 50% of capacity.[7] The capacity of Lone Star's mill at Greencastle was reduced by 1,200,000 barrels between 1933 and 1937.[8] Keystone shut down operations for one year and thereafter reduced the number of kilns which it operated.[9] Nazareth and Hercules also reduced their scale of operations.[10]

The fact that the maximum capacity of the industry was attained in 1931, three years after the production peak,

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[2] Resp. Ex. 2520: List dated 3/12/40 showing new cement plants built since 1920.
Resp. Ex. 3765: List of New Portland Cement Plants from 1911-1937.

[3] Moore, R. W., Vice President, Dewey (R) Tr. 46826-27.

[4] Id., Tr. 46732.

[5] Resp. Ex. 2405 B-C.

[6] MacDonald, B. A., Vice President, Northwestern States (R) Tr. 36475.

[7] Magee, Vice President, Alpha (R) Tr. 22628.

[8] Com. Ex. 1178: Lone Star Production and Rated Capacity in Barrels 1933-1937.

[9] Scott, H. M., President, Keystone (R) Tr. 27398.

[10] Robeson, Vice President, Nazareth (R) Tr. 27997.
Brobston, President, Hercules (R) Tr. 26232.

(See Chart I-F, *supra*, p. 71) may be considered in relation to the indicated two or three years' time required to construct a cement plant.[11]

6. Effect of Limited Storage Facilities

Storage is a major factor in determining the percentage of operation.[1] Acting like a funnel, when the storage bins are filled production must be stopped.[2] The maximum storage capacity of the industry existed in 1929 and amounted roughly to 30 million barrels. Since the stockhouses at most plants then were practically full the physical limitations that existed at different plants actually controlled production at those plants during the succeeding period from 1930 to 1932. The industry could only manufacture and put into the bins what it took out and shipped.[3]

The storage facilities at most plants provide for a three months' supply,[4] and such facilities generally are insufficient for continuous operation.[5] Approximately 10% of the storage space has to be devoted to clinker for flexibility between the burning and grinding operations[6] and with the increase in the number of specifications and require-

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[11] Moore, R. W., Vice President, Dewey (R) Tr. 46819.

[1] Brobston, President, Hercules (R) Tr. 26232-33.
MacDonald, B. A., Vice President, Northwestern States (R) Tr. 36454-55.

[2] Browder, Traffic Manager, Penn-Dixie (R) Tr. 38134-35.
Alexander, President, Missouri (R) Tr. 37188.
Com. Ex. 553-2 Z-3 A: Letter J. Treanor, then President, Riverside, to B. Kilgore, Wall Street Journal, dated Mar. 5, 1934.

[3] Com. Ex. 2892: Letter, Mallory, Statistician, Cement Institute, to H. M. McGill, President, McGill Commodity Service, Inc., dated Mar. 19, 1935.

[4] Magee, Vice President, Alpha (R) Tr. 22666-68.

[5] Brooke, Vice President, Monarch (R) Tr. 42185.
Porter, President, North American (R) Tr. 33765.

[6] Magee, *supra*, Tr. 22656-63.

ments for sealed bins more space has been devoted to such special uses.[7]

The geographic location of plants affects storage requirements. Plants located in the north whose peak shipments are made in the summer have to store for such peaks.[8] Seasonal fluctuations and demand affect storage facilities so that the cost for storage is greater than if the cement business were on an even keel.[9] With increased storage the capital investment for such facilities as well as in and out handling costs increase.[10] Further evidence as to the relation of storage space to capacity and the increased cost of storage was excluded by the Trial Examiner.[11]

7. Effect of Fluctuations in Demand: Seasonal, Regional and Other

Commission's counsel stated that demand in the cement industry varies from time to time,[1] and admitted that demand in the territory of every mill in the industry has been fluctuating and is not uniform throughout its sales area.[2] The evidence shows that demand is seasonal in some areas and not in others. Cement is used almost entirely out of doors and construction work is discontinued in stormy weather. When the weather is cold, work is carried on only at a disadvantage and increased expense. In the

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[7] Magee, Vice President, Alpha (R) Tr. 22669-71, 22673-74.
Moore, R. W., Vice President, Dewey (R) Tr. 46885.
Porter, President, North Ameri[illegible] (R) Tr. 33765-66.

[8] Magee, *supra*, Tr. 22665-67, 22756-57.

[9] Robeson, Vice President, Nazareth (R) Tr. 27997.
Warren, G. E., Vice President, Southwestern (R) Tr. 28747-50.
Bates, J. E., Sales Manager, Federal (R) Tr. 30483-86.
Russell, Vice President, Peerless (R) Tr. 34326-27.

[10] Magee, *supra*, Tr. 22665-66.

[11] Tr. 36866-68.

[1] Tr. 37178.

[2] Tr. 37196.

northern half of the United States, where most cement is used, construction work is discontinued substantially during the winter although there has been an effort by the industry to increase winter construction. Moreover, it costs more to make cement in the winter in the north due to open quarries. The seasonal factor causes wide variations in the percentage of capacity operation by different mills.[3] Seasonal variation is by no means constant. The United States Bureau of Mines' monthly estimates of shipments from 1928 to 1937 show that peak shipments in 1928 to 1930 were in August but from 1931 to 1937 they varied between May and October.[4] The peak shipments of one respondent fluctuated as follows: 1927—July, 1928 to 1930—August, 1931, 1933 and 1937—May, 1932—September, 1934—June, 1935—April and 1936—March.[5]

In addition there are regional, annual and other fluctuations in demand. Peaks in the construction industry are notoriously high and erratic. Local demand in one year may not be repeated for many years. Demand in different consuming districts varies in intensity and occurrence not

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[3] Com. Ex. 553-2 Z-3 A: Letter, Treanor, Riverside, to Kilgore, Wall St. Journal, dated 3/5/34.

Magee, Vice President, Alpha (R) Tr. 22593-94.

Robeson, Vice President, Nazareth (R) Tr. 27994, 28000;

Resp. Ex. 1422: Percentage of yearly shipments by month, 1936-1937.

Russell, Vice President, Peerless (R) Tr. 34326-27.

Brobston, President, Hercules (R) Tr. 26229-30.

Warren, G. E., Vice President, Southwestern (R) Tr. 28746-47, 28750.

Bates, J. E., Sales Manager, Federal (R) Tr. 30485.

Ackerman, Vice President, Lawrence (R) Tr. 31183-84.

Browder, Traffic Manager, Penn-Dixie (R) Tr. 38135.

Porter, President, North American (R) Tr. 33766-67.

Davis, President, Superior (R) Tr. 29588.

[4] Resp. Exs. 3558-59.

[5] Resp. Ex. 3584: Oklahoma shipments 1927-1939.

only between cities and counties, but states and larger areas. Large projects such as dams, highways and bridges occur indiscriminately.[6] Notable examples are the movement of the textile industry from New England to the south during the depression,[7] the huge Boulder Dam,[8] the all-time peak demand in 1926 in Southern California which was 260% greater than in 1920, although the peak year for the country as a whole was 1928 and in that year Southern California used only 60% of capacity.[9]

The extent of the overall variations in demand, is shown by the annual shipment figures for each of the 12 Bureau of Mines districts as shown by the statistics of the United State Bureau of Mines for the period from 1920 to 1937.[10] (See Chart I-F, *supra*, p. 71.) These statistics show that peak shipments varied in the different districts as follows:

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[6] Com. Ex. 553-3 A-B: Letter dated 3/5/34, Treanor, Riverside, to Kilgore, Wall St. Journal.

Resp. Ex. 3745 B-C: Excerpts from testimony of Smith, Universal Atlas, at Wheeler Hearings, 1936.

Bowen, Vice President, Lehigh (R) Tr. 26593-94.

Mallory, Statistician, Institute (C) Tr. 17429.

Russell, Vice President, Peerless (R) Tr. 34331-32.

Alexander, President, Missouri (R) Tr. 37195-96.

Magee, Vice President, Alpha (R) Tr. 22929-60.

Brobston, President, Hercules (R) Tr. 26229-30.

Warren, G. E., Vice President, Southwestern (R) Tr. 28746-47, 28750-53.

Browder, Traffic Manager, Penn-Dixie (R) Tr. 38141, 38149.

McKee, Vice President, West Penn (R) Tr. 27835.

Ackerman, Sales Manager, Lawrence (C) Tr. 8211-13.

[7] Ackerman, *supra*, Tr. 8213.

[8] Resp. Ex. 3745 B: Excerpt from testimony of Smith, Universal Atlas, at Wheeler Hearings, 1936.

[9] Com. Ex. 553-3 B: Letter dated 3/5/34, Treanor, Riverside, to Kilgore, Wall Street Journal.

[10] Resp. Ex. 3661.

Year	District Number
1927	1 and 11
1928	3, 4, 5 and 6
1929	2, 8 and 9
1930	7
1936	10
1937	12

One effect of the foregoing fluctuations in demand has been the expansion of local plant capacity to meet local peak demand, so that the surplus capacity of the industry cannot be weighed accurately in relation to the peak national demand in 1928 or any other given year but only in relation to the total of all local peaks whenever they occurred.[11] Moreover, it appears from the statistics of the United States Bureau of Mines showing shipments from mills into states during the period 1924 to 1938 that there is not as a rule sufficient cement demand in the areas adjacent to mills to absorb their full production.[12] Hogan, President of Lone Star, testified that four of his company's mills did not have nearly enough business in their adjacent territory to support them.[13] Brooke, Vice President of Monarch, testified that in order to get a fairly good volume his company had to cover a wide territory.[14] Alexander, President of Missouri, testified that if his company were confined to selling at its mill the fluctuation in demand would bring about "a feast or a famine."[15] (The evidence on the related topic of the effects of limited

[11] Com. Ex. 553-3 B, *supra*.

[12] Resp. Exs. 3769-81.

[13] (R) Tr. 34621.

[14] (R) Tr. 42366-67.

[15] (R) Tr. 37196-97.

market areas under the so-called uniform f.o.b. mill method of selling is digested separately in Part XX, *infra*.

Another effect of these fluctuations is that they increase costs of production whether they be overhead, supervisory or actual operating costs.[16] Among other things the shutting down and reopening of a kiln is very expensive. as more substantial amounts of fuel are required for reheating and the cooling sometimes results in cracks necessitating relining the kiln.[17] Shutdowns increase labor costs by requiring overhead and maintenance men.[18]

In seeking to meet these conditions manufacturers plan closely, using the best available sources of statistical and other information together with their own experience.[19] They strive to achieve economy through uniform operation and to spread out employment.[20] An executive of one

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[16] Davis, President, Superior (R) Tr. 29588.
Russell, Vice President, Peerless (R) Tr. 34326-27.
Warren, G. E., Vice President, Southwestern (R) Tr. 28748-50.
Porter, President, North American (R) Tr. 33765.
Robeson, Vice President, Nazareth (R) Tr. 27996-97.

[17] Magee, Vice President, Alpha (R) Tr. 22705.
McKee, Vice President, West Penn (R) Tr. 27837.
Scott, H. M., President, Keystone (R) Tr. 27398.
Brooke, Vice President, Monarch (R) Tr. 42186.

[18] Warren, G. E., *supra*, Tr. 28751-52.

[19] Magee, *supra*, Tr. 22651-53.
Alexander, President, Missouri (R) Tr. 37241-42.
Brobston, President, Hercules (R) Tr. 26231-32.
MacDonald, B. A., Vice President, Northwestern States (R) Tr. 36454-56.

[20] Magee, *supra*, Tr. 22655-56, 22667-68.
Russell, *supra*, Tr. 34327.
Scott, H. M., *supra*, Tr. 27397-98.
Robeson, *supra*, Tr. 27998.
Brooke, *supra*, Tr. 42186.
Brobston, *supra*, Tr. 26232.
Warren, *supra*, Tr. 28752.

respondent testified that advance notice was given to its employees' union when a shutdown was approaching.[21] Other executives testified that they seek to avoid the fluctuations caused by large contracts,[22] to persuade the construction industry to spread its work on a more even keel[23] and to adjust their storage facilities to the highest pitch of efficiency between the successive stages of manufacture.[24]

8. Effect of Volume on Cost

A further important consideration in the development of existing plant capacity has been that of the economy resulting from volume and size.[1] Large units bring about lower production cost[2] and increased production lowers the overhead per barrel. This is true not only with respect to manufacturing costs but as to overhead and selling costs.[3] Selling costs are almost directly proportionate to volume.[4]

H. Elimination of Obsolete and Less Advantageously Located Plants.

Bowen, Vice President of Lehigh, testified that it has been the policy of his company to refrain from spending undue sums on its older and obsolete plants and to charge them off while at the same time concentrating on

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[21] Scott, H. M., President, Keystone (R) Tr. 27398-99.

[22] Wood, General Manager, Green Bag, West Va. (R) Tr. 29481.

[23] Robeson, Vice President, Nazareth (R) Tr. 28000.

[24] Brobston, President, Hercules (R) Tr. 26233.
Magee, Vice President, Alpha (R) Tr. 22661-62.

[1] Brobston, *supra*, Tr. 26230.
Hanahan, President, Volunteer (R) Tr. 38689-90.

[2] Moore, R. W., Vice President, Dewey (R) Tr. 46833.

[3] Ackerman, Vice President, Lawrence (R) Tr. 31178-80.
Porter, President, North American (R) Tr. 33825.

[4] Horner, President, Kosmos (R) Tr. 36861.

maintaining the maximum efficiency in plants which were felt to have a future.[1] In keeping with this policy Lehigh has abandoned its original plant at Ormrod, Pennsylvania, constructed in 1897, the older of its two plants at Mitchell, Indiana constructed in 1902,[2] and its plants at West Coplay, Pennsylvania and Wellston, Ohio. The plants at Ormrod, Mitchell and West Coplay had become obsolete to such an extent that the cost of rehabilitation was prohibitive. New mill construction had reduced the Mitchell territory. Operations at Wellston had been unsuccessful. The raw material there was of poor quality and it became necessary to import materials. In addition the plant was found to be located over an abandoned coal mine which caused its foundations to sink.[3]

Magee, Vice President of Alpha, testified that after 10 years of struggle his company abandoned its Bellevue, Mich. plant. Although the plant was well located with respect to raw materials it was poorly built and inefficient and consumed an unduly large amount of power. Despite improvements its labor costs remained high and complete rebuilding would have been necessary to place it on a profitable basis. After operations there were discontinued the machinery and equipment were sold at scrap prices.[4]

Universal Atlas kept a running record which shows that approximately 40 cement plants have been abandoned since 1910, of which 8 were in Kansas, 7 in Michigan, 6 in Pennsylvania, 4 in Ohio, 3 in New York, 3 in Indiana and the remainder in Massachusetts, New Jersey, Virginia, Illinois, Oklahoma, South Dakota, Arizona and California.[5]

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[1] (R) Tr. 26600-01.

[2] Bowen, Vice President, Lehigh (R) Tr. 26562-64.

[3] Id., Tr. 26574-75, 26578.

[4] (R) Tr. 22632-35, 22918.

[5] Resp. Ex. 2521: Memorandum dated 3/16/40 listing plants abandoned since 1910.
Stone, Vice President, Universal Atlas (R) Tr. 35197-98.

With respect to the abandoned mills in Michigan, Russell, Vice President of Peerless, testified that they had gone downhill either because of equipment wearing out, obsolescence of methods or depletion of raw material resources.[6]

With respect to the abandoned mills in Kansas, R. W. Moore, Vice President of Dewey, testified that they were located in the so-called gas belt and during the period in which they were dismantled demand for cement was increasing.[7] His further testimony that the price of gas became so high that it became prohibitive to use it in the manufacture of cement, was excluded.[8]

I. Limitation of Marketing Areas Around Each Plant.

Substantially all of the respondents testified as to their marketing areas by outlining the states and areas of states into which they ship their product. This testimony is of a general character and is not set forth here. Testimony of a more specific nature is digested and also five exhibits are reproduced in which the marketing areas of five respondents, one chain company and four single plant companies located in different parts of the country, are shown in detail.

Most of Federal's shipments move to points within 85 miles of the mill at Buffalo, N. Y.[1]

In 1937, the percentage of Medusa's total shipments from their various mills[2] was as follows:

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[6] (R) Tr. 34170-71.

[7] (R) Tr. 46827-28.

[8] (R) Tr. 46834-35.

[1] Bates, J. E., Sales Manager, Federal (R) Tr. 30508-09.

[2] Resp. Ex. 3065 A-F.

Mill	100 miles or less	250 miles or less	300 miles or less
York, Pa.	75.24%	87.13%	91.14%
Wampum, Pa.	46.69	94.41	95.34
Bay Bridge, O.	94.66	99.94	99.99
Toledo, O.	49.64	99.77	—
Dixon, Ill.	71.93	95.18	99.03
Manitowoc, Wis.	48.20	91.84	99.81

National ships to markets located up to 540 miles from their mill at Ragland, Ala.[3]

In 1937, Nazareth shipped 69.88% of its total shipment to points 100 miles or less from their mill and 99.07% to points 250 miles or less. No shipments were made beyond 300 miles from their mill at Nazareth.[4] The average shipment made by Peerless in 1938 moved 32 miles from their mill at Detroit. The farthest distance was approximately 250 miles on a very small portion of the cement.[5]

HERMITAGE: *mill at Nashville, Tenn.; Chart I-G,* p. 92.

The area surrounding this mill in which Hermitage normally solicits business is shown as the colored area (both pink and green) on the chart. The area in which Hermitage enjoys a freight advantage over its competitors is colored pink. Black dots show the location of mills of some competitors. This map was identified by McGovern, Sales Manager, Hermitage, as the marketing area in 1937.[6]

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[3] Resp. Ex. 3012.

[4] Resp. Ex. 1421 for id. Included in Motion to Adduce.

[5] Russell, Vice President, Peerless (R) Tr. 34426-27.

[6] (R) Tr. 36109-10; Resp. Ex. 2648.

The percent of Hermitage shipments in 1937 within the zones shown on the map were:

10 mile zone	29%
25 " "	1
50 " "	11
75 " "	8
100 " "	9
125 " "	12
150 " "	3
Beyond 150 mile zone	27
	100%[7]

KEYSTONE: *mill at Bath, Pa.*: *Chart I-H*, p. 93.

The colored area on the chart (both pink and green) shows the area in which Keystone normally solicits business and the area in which it enjoys an equal or lower freight than its competitors is colored pink. This map was identified by H. M. Scott, President, Keystone,[8] and he testified that this map was prepared in connection with consideration of the United States Procurement Division's so-called Good Friday inquiry for f.o.b. mill bids to show the rather small territory to which Keystone's freight rates were lower than or equal to rates from competing mills.[9]

LONE STAR: *all mills*: *Chart I-I*, p. 94.

The colored area on the chart (both pink and green) shows the area in which Lone Star normally solicits business and the area in which Lone Star enjoys an

[7] Resp. Ex. 2647.

[8] (R) Tr. 27582-83; Resp. Ex. 1417.

[9] Id., Tr. 27577-83.

equal or lower freight than its competitors is colored pink. This map was identified by Hogan, President, Lone Star[10] who testified that it was prepared to show graphically the position of Lone Star mills with respect to f.o.b. mill selling as compared with delivered price methods of selling.[11]

The percentage of Lone Star shipments into the pink area on the map, *i.e.*, freight advantage territory, in 1935 to 1938 inclusive, is as follows:

	1935	1936	1937	1938
Hudson, N. Y. mill	73.5	76.8	74.5	71.0
Nazareth, Pa. mill	39.6	40.2	41.0	50.0
Norfolk, Va. mill	85.7	81.0	73.5	73.7
Birmingham & Spocari mills	55.3	38.2	41.0	37.3
New Orleans mill	94.7	90.8	92.8	98.3
Dallas, Texas	63.0	33.5	32.2	40.3
Houston, Texas	53.7	50.7	56.2	44.0
Limedale, Ind.	37.4	40.3	37.6	41.3
Bonner Springs, Kan.	40.2	39.5	42.2	40.5[12]

In the preparation of the map Hogan testified that in marking the limits of the pink and green areas he considered only freight rates from cement mills. Price did not enter in.[13]

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[10] (R) Tr. 34580-85; Resp. Ex. 2460.

[11] Id., Tr. 34585.

[12] Id., Tr. 34661-62; Resp. Ex. 2462 A-C.

[13] Id., Tr. 34692-94.

NEBRASKA: *mill at Superior, Neb.*: *Chart I-J*, p. 95.

The area surrounding this mill in which Nebraska normally solicits business is shown as the colored area (both pink and green) on the chart. The area in which Nebraska enjoys a freight advantage over its competitors is colored pink and the locations of competitive mills are shown by black dots. This exhibit was identified by Hoenig, Sales Manager, Nebraska[14] and represents Nebraska's marketing territory substantially for the last 20 years.[15]

SOUTHERN STATES: *mill at Rockmart, Ga.*: *Chart I-K*, p. 96.

The area surrounding this mill in which Southern States normally solicits business is shown as the colored area (both pink and green) on the chart. The area in which Southern States enjoys a freight advantage over its competitors is colored pink. Black dots show the location of mills with which Southern States competes. This exhibit was identified by Elcock, Vice President, Southern States[16] and he testified that Southern States markets the largest percentage of its cement in northern Georgia, western South Carolina and western North Carolina, most of which is in freight advantage territory. They are unable to sell in Florida because the price is too low there and have found it impossible to sell in the large markets in Birmingham, Ala. and Knoxville, Tenn. both of which are just outside its marketing area.[17]

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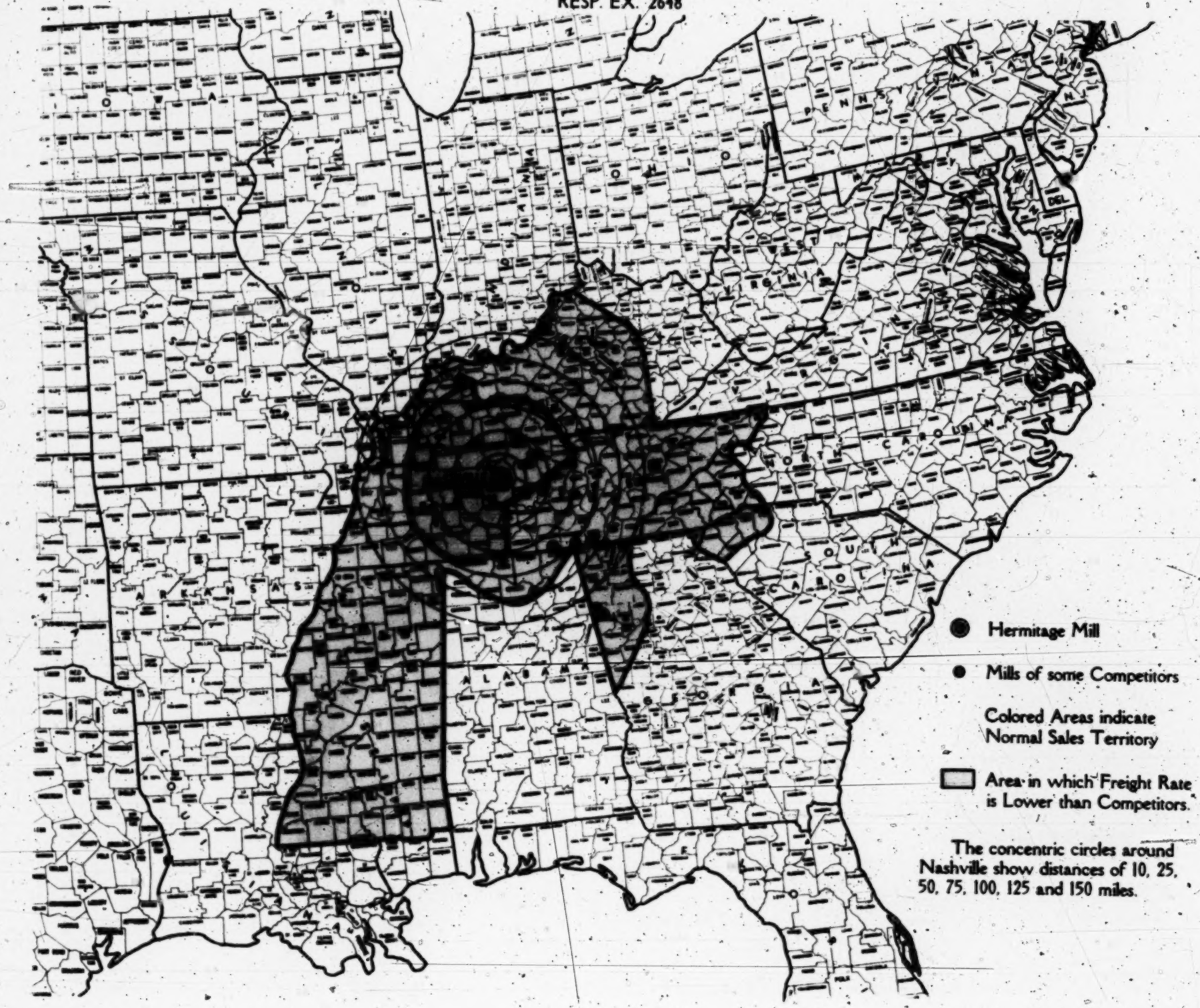
[14] (R) Tr. 41968-69; Resp. Ex. 3408.

[15] Id., Tr. 41978.

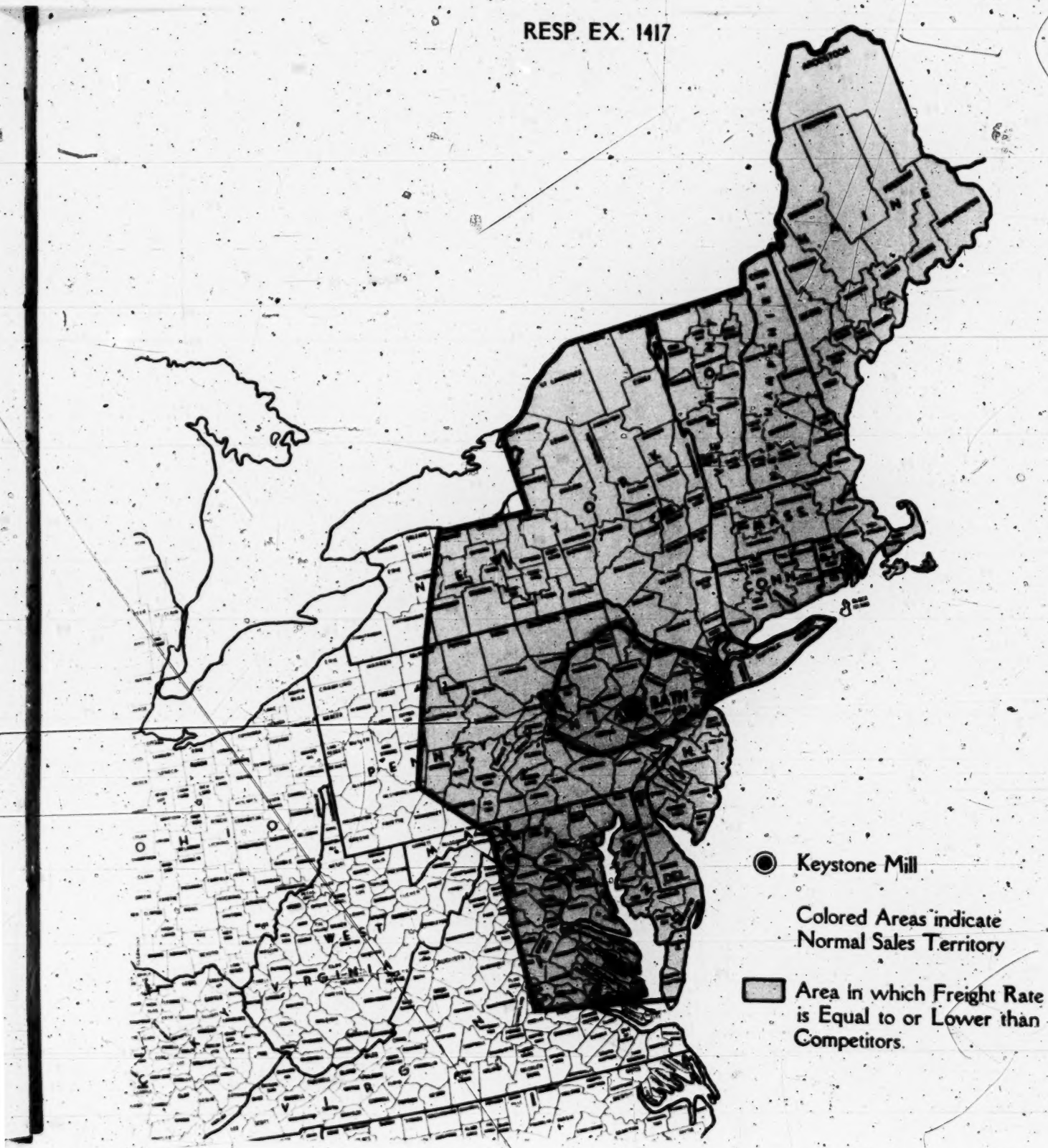
[16] (R) Tr. 37498-99; Resp. Ex. 2816.

[17] Id., Tr. 37499-500.

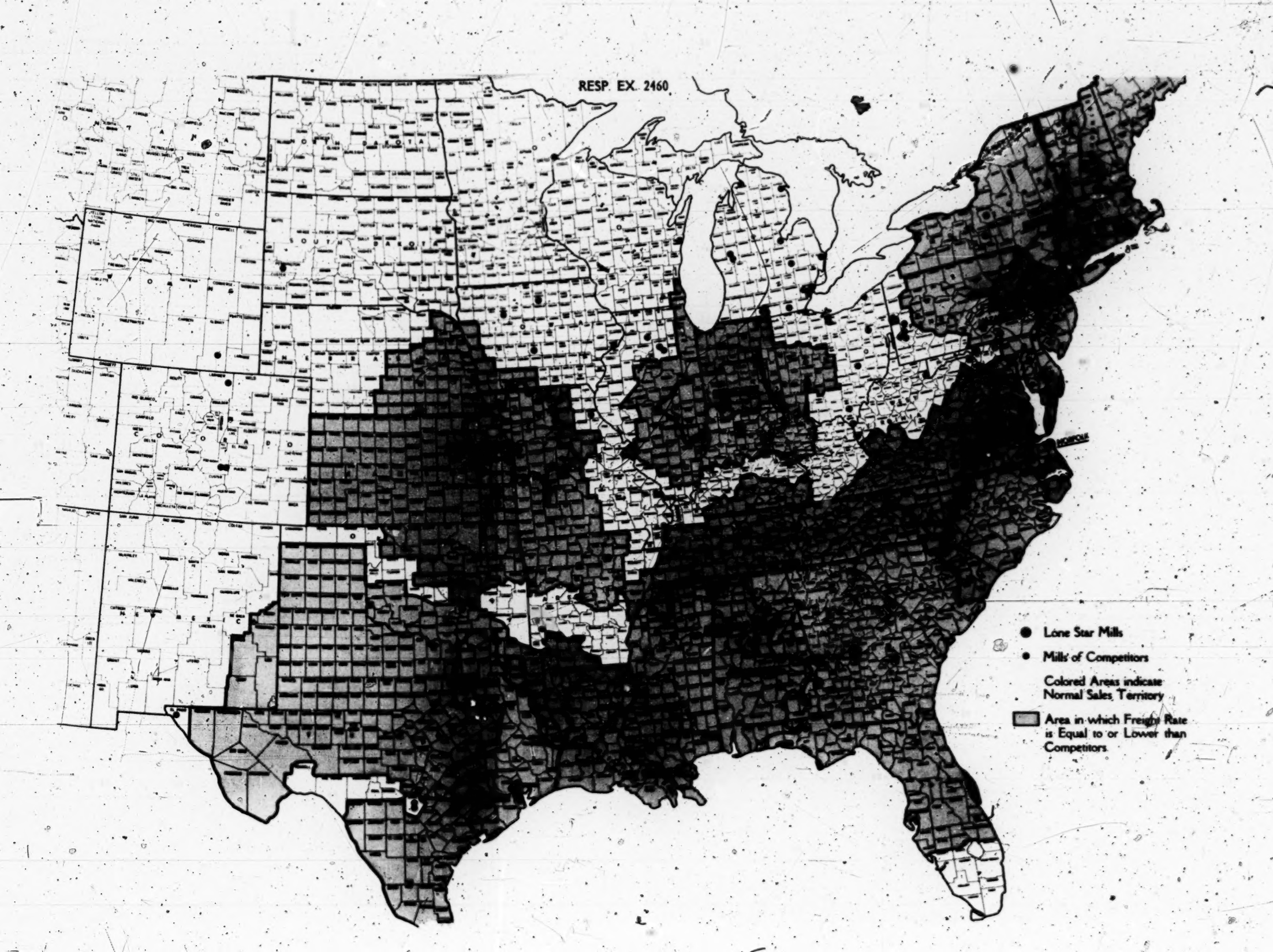
RESP. EX. 2648


Hermitage Mill
Mills of some Competitors
Colored Areas indicate Normal Sales Territory
Area in which Freight Rate is Lower than Competitors.
The concentric circles around Nashville show distances of 10, 25, 50, 75, 100, 125 and 150 miles.

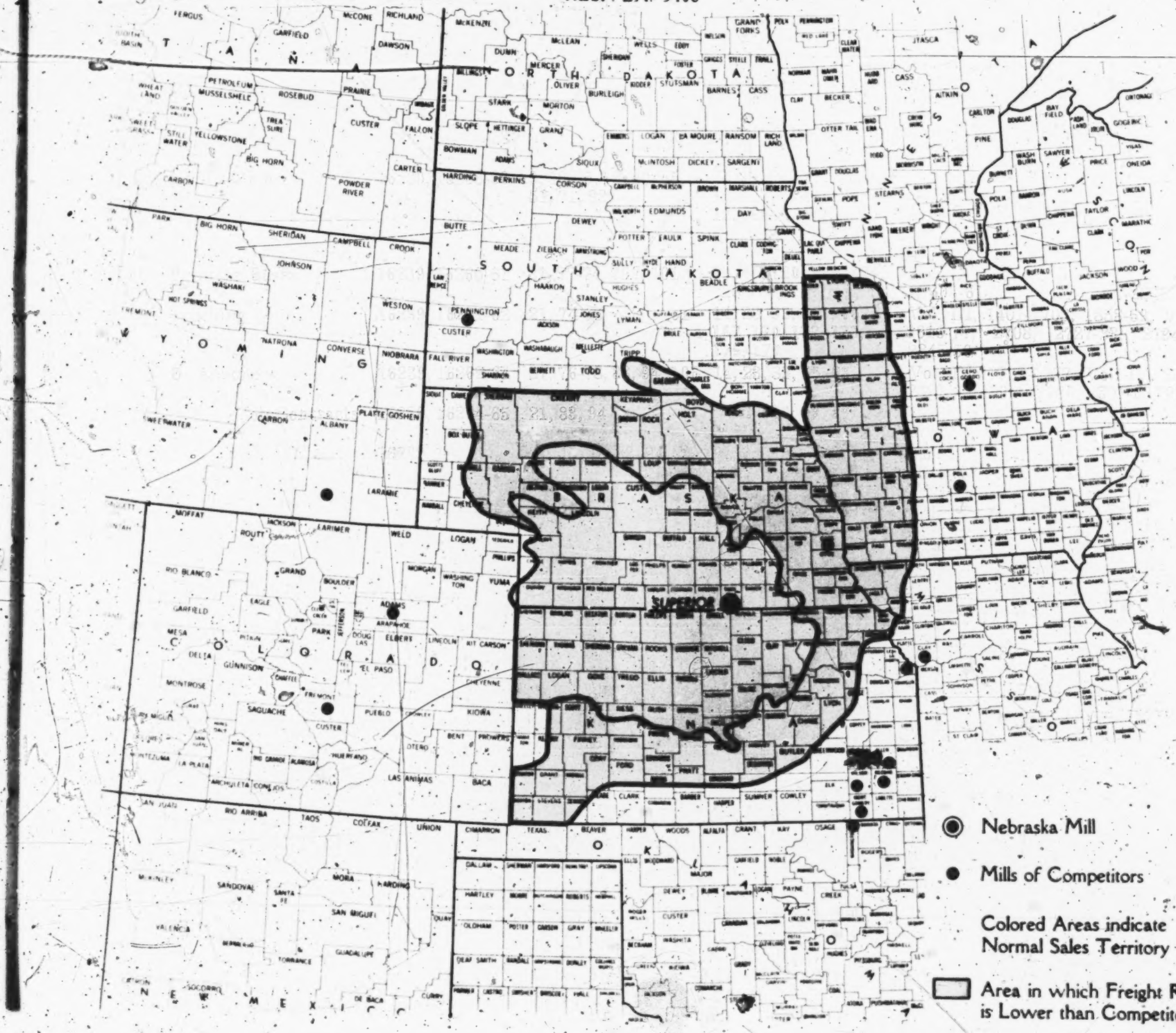
RESP. EX. 1417


Keystone Mill
Colored Areas indicate Normal Sales Territory
Area in which Freight Rate is Equal to or Lower than Competitors.

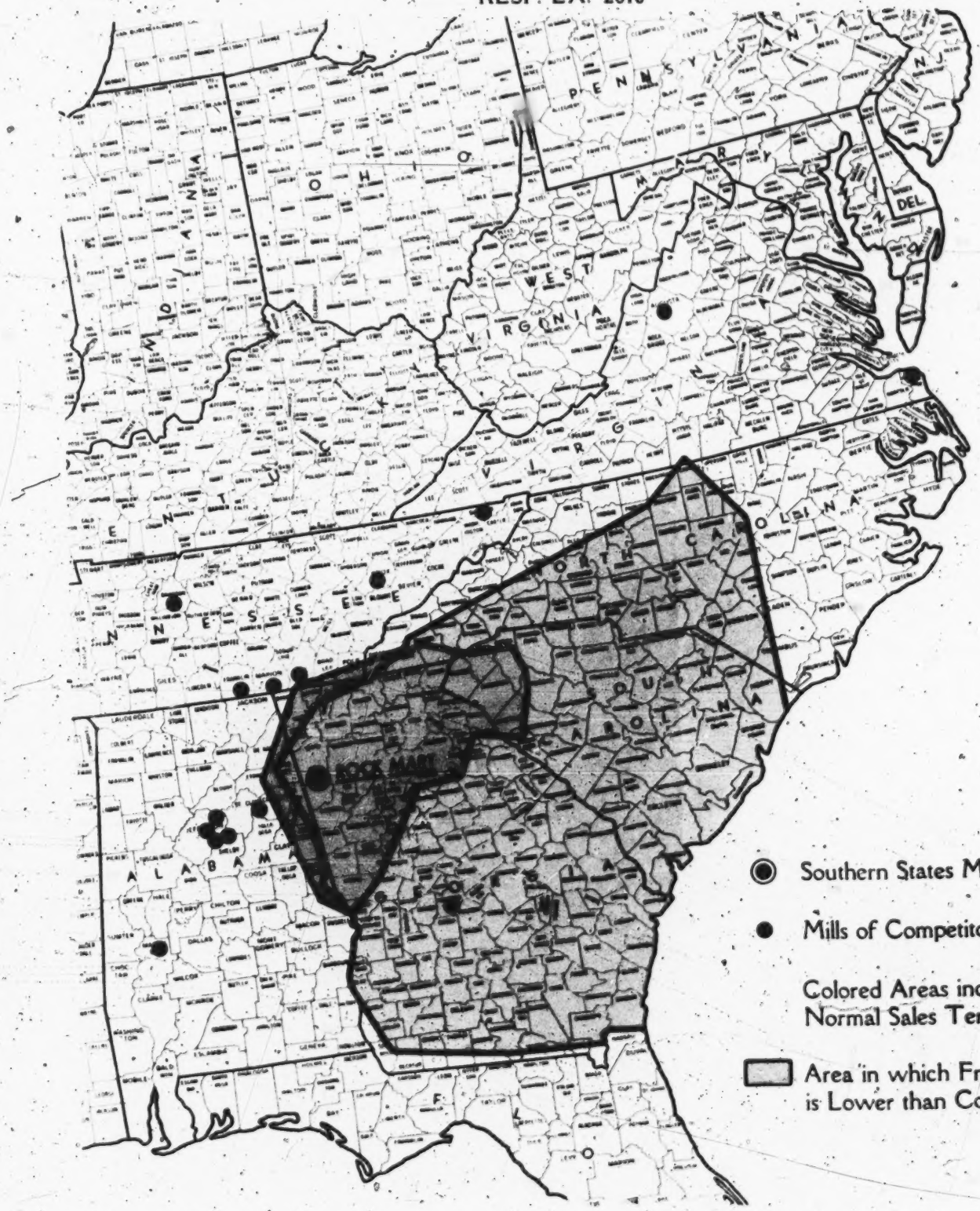
RESP. EX. 2460


Lone Star Mills
Mills of Competitors
Colored Areas indicate Normal Sales Territory
Area in which Freight Rate is Equal to or Lower than Competitors

RESP. EX. 3408


SUPERIOR
Nebraska Mill
Mills of Competitors
Colored Areas indicate Normal Sales Territory
Area in which Freight Rate is Lower than Competitors.

RESP. EX. 2816


PENNSYLVANIA
OHIO
WEST VIRGINIA
MARYLAND
DEL
NEW JERSEY
KENTUCKY
VIRGINIA
TENNESSEE
MISSISSIPPI
NORTH CAROLINA
SOUTH CAROLINA
ALABAMA
GEORGIA
FLORIDA
ROCK MART
Southern States Mill
Mills of Competitors
Colored Areas indicate Normal Sales Territory
Area in which Freight Rate is Lower than Competitors.

PART II

CEMENT PRICING—COMMERCIAL

A. The Origin of Delivered Prices.

The evidence is uncontradicted that it has been the practice and custom to sell cement generally at delivered prices for over twenty-five years.[1]

A pamphlet issued by Hercules in 1924 entitled "How Portland Cement is Distributed" describes the origin of delivered prices as follows:

> "The origin of the practice of selling cement F.O.B. point of delivery is easy to trace. It had its genesis in the development of the industry itself and results from economic causes beyond the control of either the sellers or buyers of Portland cement.
>
> In the early days of the development of the Portland cement industry in the United States, Portland cement was produced in substantial quantity only in the so-called Lehigh Valley, 25 or 30 miles long, and a few miles wide, in Eastern Pennsylvania and Western New Jersey. Users of the commodity in the West were obliged to pay not only the going price at the mill, but the freight charges necessary to have it transported from the Lehigh Valley Mills to destination. When there were practically no mills in the country except in the Lehigh Valley district, the price quoted was arrived at by adding the freight charge to the price at the mill located in that district.

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[1] Commission counsel, so conceded, Tr. 9743.
Coogan, Vice President, Alpha (R) Tr. 23044.
Bowen, Vice President, Lehigh (R) Tr. 26612-13.
Brobston, President, Hercules (R) Tr. 26424-25.
Koch, Vice President, Lone Star (R) Tr. 32649-50.
Moore, Vice President, Dewey (R) Tr. 46778.
Hanahan, President, Volunteer (R) Tr. 38628-29.
See Com. Ex. 95 a, Institute Executive letter quoting opinion in *Cement Manufacturers Protective Assn.* v. *U. S.*, 268 U. S. 588.

At that time, too, many of the manufacturers sold their product through large distributors who, in turn, sold it to dealers. This was probably due to the fact that prior to the development of cement production in this country, imported cement had been handled in that way by importers. Furthermore, until 1907 railroad rates were more or less unstable and this situation, too, had its influence on the marketing methods then in vogue.

• • •

In the ten or fifteen years following 1900 Portland cement manufacturing plants were built in nearly every section of the country. As a result of the enormous development of the productive capacity and the widespread location of manufacturing plants, a change in these early marketing methods became inevitable. As mills developed in the Western and Southern parts of the country and as production centers were established in many different localities, these newer mills, having a substantial productive capacity, established prices at their own mills, whence purchasers could obtain cement by paying their mill price plus actual freight charges to destination.

This growth and spread of producing plants brought about intense competition in the territories previously served practically exclusively by the Lehigh Valley mills.

The newer producers, not having the sales agencies then in use by the Lehigh Valley producers, found it advisable, in order to market their product economically, to go directly to the retail dealers.

This development caused a general change in the selling practice, so that the first decade of the present century saw most of the cement manufacturers, wherever located, seeking markets among retail dealers and selling direct to them. Mills passing their product through three to five hands were in no position to compete with those manufacturers who sold with one handling.

• • •

There were several important results in this evolution:

(1) As the newer production centers and individual mills increased their output and sold cement at their own mill price plus freight to destination, the ability of the Eastern mills to meet this competition in distant markets, especially in the west, was gradually, but substantially lessened.

(2) Competition in the markets served by both the old and the new mills, and to which freight charges were more or less the same, was intensified.

(3) Because of the variety of production sources and varying distances freightwise from these centers to markets, purchasers of cement practically insisted upon quotations F.O.B. point of delivery as a matter of convenience." (Com. Ex. 1321; Resp. Ex. 1108, pages 10-12)

There was evidence upon each of the following topics as relating to the origin of delivered prices:

Early methods of selling foreign cement
Distribution through wholesale distributors, agents or other middlemen
Increasing numbers of cement mills and their spread westward
The buyer's position
The North American License Agreement
Early Trade Association activities.

The evidence as to each of the foregoing is set out separately.

1. The Influence of Foreign Cement Distribution Methods

For many years after the erection of the first Portland cement plant in the United States in 1870, American consumers preferred the foreign to the domestic product. As

late as 1895, when domestic production reached 990,000 barrels, imports totaled 2,997,395 barrels.[1] Imported cement continued to be a factor in the American market through the early years of the twentieth century.

The manner in which foreign cement was sold in the years following the turn of the century was described by J. Ross Hanahan, President of the respondent Volunteer and also President of the Carolina Portland Cement Company,[2] who was a distributor of the imported and domestic product at that time. He testified that the Carolina Portland Cement Company began business in 1900 as a small dealer in Charleston, South Carolina, but it soon became a jobber[3] of building supplies and building materials throughout the southeast. It continued as a jobber until during some time in 1920. During the period from 1900 to 1905, the Carolina company's principal source of supply was foreign cement.[4] In that connection Mr. Hanahan testified further as follows:

> "Q. When you were a small dealer, as you have described, in Charleston, what kind of prices did you obtain; I mean by that f.o.b. mill or delivered prices? A. We bought our foreign cement C.I.F.; that is, cost insurance and freight, delivered at Charleston, put it in warehouses, and distributed it. When we bought from the eastern mills we frequently bought in ten or fifteen or twenty thousand-ton lots. We brought it down by boat to the ports along the Atlantic and Gulf and distributed it. We bought f.o.b. mill or f.o.b. boat. (Tr. 38626-27).

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[1] See Part I, p. 43, *supra*.

[2] (R) Tr. 38605, *et seq*.

[3] Mr. Hanahan defined a jobber as an agent, sometimes for the manufacturer, but also one who purchased the material outright for sale to dealers, contractors and other buyers of builders' supplies. (Tr. 38608)

[4] (R) Tr. 38607-09, 38626.

Q. To whom did the Carolina Portland Cement Company re-sell its cement? A. They sold cement to contractors and construction work, and to dealers, too.

Q. What was the nature of the prices at which you sold them? * * * I mean, were they f.o.b.? A. No; they were delivered." (Tr. 38628)

Mr. B. F. Affleck, former President of Universal Atlas, who has been in the cement business 40 years[5] in his testimony before the Committee on Interstate Commerce of the United States Senate in hearings on the so-called Wheeler Anti-Basing Point Bill said:

> "In 1896 nearly all cement was imported, most of it through the port of New York. The use of cement in the United States was of very small volume and customers were widely scattered. Reinforced concrete design, which is now universal, was an unknown art in this country before the turn of the century. Importers of foreign cement offered it f.o.b. port, the customer paying the freight." (Resp. Ex. 3743 C)

Mr. Blaine Smith, President of Penn-Dixie until 1937, and since President of Universal Atlas, testifying before the same Committee said:

> "Forty or fifty years ago, most cement was imported from Europe and largely along the Atlantic seaboard. From these ports it moved into the interior. Most of it was sold f.o.b. dock, and the buyer paid the freight.
>
> The first plant was built in the Lehigh Valley about 1880. Other plants followed rather rapidly. At first the product was sold at what it would bring in competition with the more popular foreign brands. * * * The buyers were then generally large contractors and large distributors, familiar with freight rates and shipping conditions into the interior." (Com. Ex. 2878 D)

[5] Resp. Ex. 3743 C.

This was the only evidence with respect to the distribution and pricing of imported cement during this early period. Bearing on the same question, however, is the following excerpt from Resp. Ex. 3788, p. 100, the answer in *Cement Manufacturers Protective Assn.* v. *United States,* referring to the then "generally prevailing practice" of selling cement at delivered prices:

> "The practice probably originated from the mere fact that freight is an important part of the prices which the purchaser pays for the commodity, and the purchaser is seldom qualified to figure freight rates. The practice existed in the sales of natural cement before Portland cement was produced to any considerable extent in the United States. Its history cannot be accurately and briefly summarized by reason of the fact that in the early days of the industry many of the manufacturers sold their product through large distributors, who, in turn, sold to dealers, perhaps as a consequence of the fact that Portland cement (until the development of the rotary kiln did away with the advantage of the foreign producer in cheap labor), had previously been distributed by importers."

2. The Influence of Distributors

a. Early Use of Distributors

Most of the original domestic producers were located in eastern United States.[1] They appear to have selected existing distribution channels for marketing their product, *i.e.*, the jobbers and distributors who had been handling imported cement and who for whatever reason were selling at delivered prices or their equivalent, varying f.o.b. mill prices for particular destinations depending upon the

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[1] See Part I, pp. 43 *et seq., supra.*

freight cost.[2] There was no material difference in the marketing structures used by the various eastern manufacturers although at first there was a difference in the number of middlemen through which their product was channeled before it reached the ultimate consumer. Alpha originally sold its entire output to a single general sales agent who sold to exclusive agents or distributors. These agents and distributors sold to sub-distributors or to retail dealers who in turn sold to consumers.[3] The Dexter Company (one of the early domestic producers, no longer in existence[4]) and Nazareth, also contracted directly with an exclusive agent who in turn sold to distributors or sub-distributors.[5] The old Standard Company at Leeds, Alabama,[6] marketed its entire product through a single large southern distributor.[7] Lehigh originally did not have an exclusive agent or distributor, but sold its products directly to several distributors.[8] Vulcanite was another eastern manufacturer using

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[2] Brobston, President, Hercules (R) Tr. 26069-70.
Coogan, Vice President, Alpha (R) Tr. 23044-48, 23067; Resp. Exs. 432-434.
Bowen, Vice President, Lehigh (R) Tr. 26618-30.
Koch, Vice President, Lone Star (R) Tr. 32651-52, 32654-55.
Horner, President, Kosmos (R) Tr. 36387-79.
Nelson, J. L., Vice President, Wolverine (R) Tr. 36877-79.

[3] Coogan, *supra*, Tr. 23045-48; Com. Ex. 1174 G-J: F.T.C. interview with G. S. Brown, Alpha, Oct. 24, 1929.

[4] Kinney, Vice President, Portland Cement Association (C) Tr. 48508.

[5] Brobston, *supra*, Tr. 26005-06.

[6] This Company was sold out in 1919. The Leeds mill is now operated by Universal Atlas. The old Standard Company has no connection with the respondent Standard.
Hanahan, President, Volunteer (R) Tr. 38610.

[7] Hanahan, *supra*, Tr. 38611-12.

[8] Bowen, *supra*, Tr. 26562.

distributors.[9] In the far south, Kosmos sold through distributors as did other mills.[10] In areas further removed from the eastern area many of the earliest established companies also adopted the existing distribution channels.[11]

b. Methods of Sale to and by Distributors

Originally sales by the domestic manufacturers to their respective sales agents, distributors and other wholesale middlemen were at f.o.b. mill prices.[1] Blaine Smith testified before the Senate Committee on this subject as follows:

> "* * * As the domestic cements gradually established themselves as dependable products on a par with imported brands, and as demand increased, production in the Lehigh Valley increased, and the cement was largely sold at an f.o.b. mill price, the buyer paying the freight. The buyers were then generally large contractors and large distributors,

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[9] Hanahan, President, Volunteer (R) Tr. 38630.

[10] Horner, President, Kosmos (R) Tr. 36878-79.
Koch, Vice President, Lone Star (R) Tr. 32652-53.

[11] Koch, *supra*, Tr. 33216, 32658-59 (re now defunct Kansas Company).
Brooke, Sales Manager, Monarch (R) Tr. 12204-05.
Sunderland, President, Ash Grove (C) Tr. 13580-81.

[1] Coogan, Vice President, Alpha (R) Tr. 23045-48.
Bowen, Vice President, Lehigh (R) Tr. 26618-30, 27190.
Koch, *supra*, Tr. 32654.
Brobston, President, Hercules (R) Tr. 26069-70.
Hanahan, *supra*, Tr. 38627-28.
Sunderland, *supra*, Tr. 13580.
Horner, *supra*, Tr. 36879.
Com. Ex. 2878 D, K: Testimony of B. S. Smith, President, Penn-Dixie and B. F. Affleck, President, Universal Atlas, before Senate Committee hearings on Wheeler Anti-Basing Point Bill.
Com. Ex. 1174 G-J: F.T.C. interview with G. S. Brown, Alpha, Oct. 24, 1929.

familiar with freight rates and shipping conditions into the interior. * * *" (Resp. Ex. 2878 D)

The distributors or middlemen, in turn almost invariably sold to their customers at delivered prices.[2]

Lester Sunderland, President of Ash Grove, who has been in the cement business for 52 years, 22 years as a jobber, distributor and retail dealer, and 30 years as a manufacturer,[3] testified[4] that when he operated as a jobber he sometimes bought cement f.o.b. mill and sometimes delivered depending upon who could figure the best freight rates. Thirty-five years ago the mills sold him f.o.b. mill. Thirty years ago they did sometimes but not always. But, as a jobber he always sold at delivered prices.

Lehigh's distributor arrangements were described by John Bowen, its Vice President, as follows:

> "In the early days of the distributor relationship the sales were at f.o.b. mill prices. The commitments from the distributors to ourselves were definite commitments and the distributor was at perfect liberty and did sell as he could, for whatever measure of profit he could get.
>
> This situation, however, changed materially as new plants were built throughout the territories. There was an increasing number of cases in which the distributor found himself faced with local competition which he couldn't meet by taking the cement for which he had committed himself at a definite price.
>
> In such cases he came back to the Lehigh Company to negotiate a special price or some adjustment or concession that might enable him to meet the

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[2] Sunderland, President, Ash Grove (C) Tr. 13581.
Brobston, President, Hercules (R) Tr. 26016-17.
Koch, Vice President, Lone Star (R) Tr. 32658-59, 33216.
Brooke, Sales Manager, Monarch (R) Tr. 42204-05.
See also pp. 101, 102, 103, *supra*.

[3] (C) Tr. 13575.

[4] (C) Tr. 13579-81.

competition in that particular case, and because the distributor would, if no such adjustment had been made, have been unable to make the sale and the Lehigh Company would have lost the tonnage, there were frequent adjustments of that kind.

Cases of this sort multiplied quite rapidly, and under the pressure of this development the distributor, in an increasing number of cases, were selling the Lehigh cement at destination under prices that were arranged between himself and the company, in order to deal with the individual competitive situations.

The distributor, in many cases, made his sales f.o.b. destination although the price made to him by the Lehigh Company continued, for the most part, to be an f.o.b. mill price.

The point is that that period was a period of transition in which there was a very sharp change from the original method of outright commitment and resale to a point where the prices were fixed to meet the local competition by arrangement between ourselves and the distributor.

Q. From what you have said, I take it that the quantities and prices were negotiated between the distributors and yourselves. How often was that done? A. Several times each year, or, sometimes, more often.

Trial Examiner Norwood: In other words, if he wanted to go into more distant territory than he had been covering, he would come to you and get a lower price so that he could absorb the freight and deliver to this distant territory?

The Witness: No, your Honor, not to go into more distant territory, but to be able to continue to hold business in the territory which was allotted to him.

Trial Examiner Norwood: That is, when they cut the price against him he would ask you to help him by giving him a reduction?

The Witness: Or when a new plant was built in his territory that quoted lower prices, they came to us for adjustment to enable them to sell." (Tr. 26622-25)

Alpha's early sales methods were described in detail by F. M. Coogan, Vice President in charge of sales:[5]

"* * * When we first started in business we sold everything through a general sales agent. He did all the selling. We did the billing to the customers that he specified with the privilege on our part, of course, of turning them down for credit reasons if we felt so disposed and he would get a commission on all sales. We had no salesmen. We did not carry on any selling activities except in the way of an extremely limited territory near our plant which was then only located at Alpha, New Jersey. That continued from 1897 until the end of 1901. (Tr. 23044-45)

* * *

Q. Mr. Coogan during the period that you were selling through your general sales agent that you have just described, how was the cement shipped and billed during that time? A. When we were selling through the general sales agent, most of the cement was shipped at the f.o.b. mill price. That was true while we were selling through the distributors in 1902.

Q. Now, when you commenced selling to distributors, how did you handle the cement? A. When we sold to distributors, most of the cement was billed direct to the distributors and they paid the freight and then they paid us for the cement and then they in turn rebilled their customers. Now, the distributors in a great many cases did bill their customers at delivered prices because they were familiar with the freight rates and so forth. When we started selling direct to the dealers and consumers, we found they were not so familiar with the freight rates and therefore we had to begin showing that on our quotations.

Q. As I understand, you at that time quoted a flat f.o.b. mill price to your general sales agent, and

[5] See also Com. Ex. 1174 G-J: Interview of G. S. Brown, President of Alpha, with representatives of F.T.C., October 24, 1929.

> also on your sales to distributors? A. That is correct, up until the end of 1902." (Tr. 23045-47)

Joseph Brobston, President of Hercules, had been associated with the Dexter Portland Cement Company from 1900 to 1926.[6] His testimony shows that the Dexter Company operated through an exclusive sales agent, Samuel H. French & Company, which agreed to dispose of the output of the Dexter mill.[7] The agreement with French was made in 1900, renewed in 1905 and again in 1910 and expired in 1915. French & Company were wholesalers and sold cement through distributors and, in addition, was itself a distributor for a certain territory selling to dealers.[8]

During the period 1900 to 1915 Dexter made a price at the mill to French & Company and French & Company could not sell below that price without consulting the company, but Dexter frequently gave it a special price below the mill base so that it could meet competition at destination.[9] Mr. Brobston stated:

> "The price that we made to French at the mill had the purpose of enabling him to meet the delivered price of our competitors at destination, because we couldn't have sold our cement if we hadn't done it." (Tr. 26070)

The agreement itself provided that in cases where the freight from the Dexter mill was higher than the freight from the Atlas mill, Dexter would absorb the difference in freight to destination. Under the arrangement with French, Dexter had to meet prices made by other mills as well. These included prices made by Atlas, Alpha, Lehigh, Vulcanite and Nazareth.[10]

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[6] (C) Tr. 10540.

[7] (R) Tr. 26005.

[8] (R) Tr. 26006, 26412.

[9] Brobston, President, Hercules (R) Tr. 26069.

[10] Id., 26070, 26072.

Chester Brooke, Vice President of Monarch, had been assistant sales manager of the Kansas Cement & Material Company beginning in about 1915. That was a jobber company which sold part of the output of the Monarch Cement Company and the output of the Altoona Portland Cement Company.[11] Brooke testified that the cement was shipped to the customer, but invoiced by the manufacturer to the Kansas company which in turn invoiced it to the dealers, contractors and railroad purchasing agents who were its customers. These customers were quoted f.o.b. destination and Brooke could not recall any request for f.o.b. mill prices.[12]

Harry Koch, Vice President of Lone Star also had experience in the Kansas area in early years. He entered the cement business with the old "Sunflower" Company in 1905.[13] He testified that in Kansas, Nebraska, Oklahoma and the area served from those points, distributors sold to dealers and consumers at delivered prices;[14] and that in the west the distributors were computing prices identically with the way "we are computing delivered prices today."[15]

In the "south" the Kosmos company sold to distributors, around 1908.[16] Charles Horner associated with Kosmos since 1907 and its president since 1923 testified that those distributors had their own traffic man and they bought f.o.b. mill and Kosmos did not know where the cement was going except that it was not to go into the territory that it was working itself. At that time Horner could not recollect that Kosmos sold any other customers

[11] (R) Tr. 42203.

[12] Brooke, Vice President, Monarch (R) Tr. 42204-05.

[13] (R) Tr. 32629.

[14] (R) Tr. 32658-59.

[15] (R) Tr. 33216.

[16] Horner, President, Kosmos (R) Tr. 36878.

on an f.o.b. mill basis and does not recall requests at that time to buy on an f.o.b. mill basis. The usual practice of selling on a delivered price basis at that time was because "that is the way our customers wanted it quoted".[17]

The early Universal company never sold through distributors, but always sold direct to the retail trade.[18] Its president for many years, Mr. Affleck, testified that there was never a time in the early days of Universal when they sold on an f.o.b. mill basis rather than delivered. He said that the customer wanted the price delivered where he was to use the cement and "we naturally fell in with his desires and sold delivered. I don't think there are any cases where we didn't sell delivered. There was no demand, no request for anything but delivered price."[19]

3. The Elimination of Distributors.

There was a gradual change from marketing through distributors to marketing direct, which began as early as 1902 and continued in some areas as late as 1926. In the main, however, the period from 1905 to 1912 seems to have marked the elimination of the several types of wholesale middlemen. All of the evidence indicates that the assumption of the distributors functions directly influenced the pricing methods adopted by the manufacturers.

Alpha's change over was described by Coogan:

> "Beginning in 1902, we sold to distributors. Now, when we were selling to the general sales agent, he resold the cement to distributors with limited territories. One had New England, one New York State, and so forth.
>
> Then, as the new companies came into business, that made a difference and they started selling to these distributors direct, so that it was necessary

[17] Horner, President, Kosmos (R) Tr. 36879.

[18] Affleck, President, Universal Atlas (C) Tr. 13034.

[19] Id., Tr. 13034-35.

for our company to discontinue the general sales agent and to go to selling direct to the distributors.

We did that for a time, and then as more new companies came in, they developed the habit of selling directly to the dealer trade so that we again found it necessary to eliminate our distributors. We eliminated most of them at the end of 1902. We then had one or two arrangements which were continued for several years after that. After that time, we sold direct to the dealer and consumer trade as they might request. (Tr. 23045)

* * * but immediately we began selling direct to the dealer or consumer trade, we had to keep them posted as to what the cement cost them laid down at destination. Now, in the early days, we did that by quoting a mill price and then stating on our quotation the freight rate per ton or per barrel in either wood or cotton. In the early days, most cement was shipped in barrels of four hundred pounds. Usually, we showed the freight rates per barrel or the—well, we showed the freight rate per barrel whether it was in cotton or whether it was in paper, so they could get the two and add them together and find out the price laid down at their station. (Tr. 23046)

* * *

Q. Now, did the elimination of a geenral sales agent which you have already described, and the final elimination of the distributors have any effect on the matter of freight rates in your prices? A. Oh, yes, after we eliminated the distributor and general sales agent, information about freight rates became a very important factor in our customers contract because our customers wanted the information so that they could figure what the price was laid down at their destination.

* * * In addition to these freight rates, some of our customers wanted the price laid down at destination. In those cases, we quoted them delivered prices. Some contractors who were figuring on jobs wanted to know the price of cement delivered on a car alongside the jobs. In those cases, we quoted f.o.b. destination.

In some cases, in a few cases, and for a few, very few years we still continued quoting some mill prices but at the same time showing the freight rates effective to the point where the cement was finally destined." (Tr. 23047-48)

G. S. Brown, President of Alpha, in an interview with investigators of the Federal Trade Commission in 1929, said:

"When I first came to the Alpha Company some thirty-one years ago, all cement was sold f.o.b. the mill and there were no sales made to consumers. All of our product was distributed through a single general sales agent who appointed exclusive sales agents for different territories. Thus, there was an exclusive sales agent for Boston, one for Chicago, one for St. Louis and so on. These exclusive sales agents, in turn, appointed sub-agents who sold to retail dealers, who, again in turn, sold to the consumer. There were thus four profits between the mill and the consumer under this system of sales; that of the general sales agent, that of the exclusive sales agent, that of the sub-agent, and that of the retailer. Within a hundred miles of the plant the exclusive agents were not known as agents but as distributors. The difference between the distributor and the exclusive agent was that the former paid ten cents per barrel more than the latter. Other than this, all sales agents and distributors got the same price f.o.b. the mill. When the Lehigh Company came into the picture, they employed no general sales agents but distributed through the same agents as distribute our product. The Dexter Company appointed a general sales agent, but cut out the exclusive sales agents and distributed through our sub-agents. As other mills came in they could not sell through the same agents as Alpha, Dexter and Lehigh because these agents were carrying two or three brands and were well stocked up in consequence. They therefore went directly to the retailer and our company was obliged to follow suit. The Atlas Company, however, had always had a regular sales department with travellers selling direct to much of the

retail trade. In this connection, however, it is interesting to note that we did not get rid of all of our sub-agents until the year 1915.

When we first went to the retailer we quoted him an f.o.b. mill price. The retailer, however, did not as a rule in those days have easy access to freight rates and he usually asked us to give him the cost of the cement delivered. As a result, we for a time continued to quote him on a mill basis, but in the quotation gave him the freight rate at destination, from which he could readily figure the delivered price. This was probably sometime prior to the year 1907. Subsequently, in order to save work, we began to quote delivered, and other companies did the same." (Com. Ex. 1174 G-I)

The Alpha Company had preserved records of its quotation forms from as early as 1902 and these were introduced through the witness Coogan.[1] The gradual transition from the quotation of f.o.b. mill prices showing freight to buyers destination to the flat delivered price is shown in these exhibits and the accompanying testimony.

The change-over from distributors by Lehigh was described by Bowen, Vice President:

"Q. And did these distributors—did they determine the price at which he sold the Lehigh plant's cement to his customers? A. Yes. In the beginning that was a matter entirely of their own determination, but the situation gradually changed until by 1911 most of the cement the distributor sold was at prices mutually agreed upon between himself and ourselves to meet the competition at the markets.

Q. Now you say it gradually changed. What was the result, Mr. Bowen? To what extent did this change the market conditions, if at all? I mean the result, of course, in change in the distributor's function? A. Well, as I said in the beginning, the dis-

[1] Resp. Exs. 432-450; (R) Tr. 23062-73.
Resp. Exs. 451-454; (R) Tr. 23087-90.

tributor was very definitely an independent business man buying cement from us in agreed quantities at an agreed price. He carried his own accounts, had full control of sales in the territory allotted to him, so it was his business.

Then as the situation as I have already described multiplied, and there came an increasing number of cases in which individual prices were negotiated, the result, in its final event, was to change the function of the distributor until by 1911 he was virtually a broker, selling for our account, cement at prices agreed upon between us on which he received a profit agreed upon between himself and our company, and as we looked upon it he was to all intents and purposes a broker except he still continued to carry his own account.

Q. Well, did there come a time when the Lehigh Company eliminated distributors? A. Yes. By 1911 the Lehigh Company had reached the conclusion that the distributor had outlived his usefulness and we did carry out a program that eliminated all distributors.

Q. Was that done through any organization of your own? A. Yes. As the distributors' territories were eliminated we set up in each territory our own sales organization which sold our product to the same people that distributors had formerly sold.

Q. After eliminating the distributors, how did the Lehigh Company quote its prices? A. After the completion of the elimination of the distributors, which happened in 1912, the Lehigh Company quoted its prices f.o.b. destination to an increasing extent, and by about 1913 all our commercial quotations were at f.o.b. destination prices.

Q. Now, you told us that your company took over the dealer business of distributors and found that distributors had been selling f.o.b. destination. Do you have just a general recollection on that, or can you give us any specific knowledge on that point? A. Oh, yes. I could cite as an example the case of our distributor whose territory was the western part of New York State. The arrangement with him was terminated, as I recall it, early in 1912.

Up to that time some of our sales to that distributor had been at destination prices and a good many of them had been at f.o.b. mill prices, until the arrangement was terminated.

When we took over that territory from the distributor we found that almost without exception his prices had been f.o.b. destination. Even in the cases where he bought f.o.b. mill, he continued the method that he had been using. (Tr. 26625-28)

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Q. And then did there come a time when Lehigh was marketing all of its products directly through dealers? A: Yes, sir.

Q. When did that begin? A. Around 1912. The process of eliminating distributor relations had been completed, and the Lehigh Company was operating in all territories with its own direct selling organization.

Q. And has it continued marketing directly in that way up to the present time? A. It has done so ever since.

Q. Were any other cement companies selling their products directly to dealers and not to distributors in 1911, Mr. Bowen? A. Yes, Some of our competitors were selling through their own organizations for some years before we made the change, and some others continued to sell through distributors for a good many years after we discontinued them. (Tr. 26629-30)

• • •

A. There wasn't any particular time at which we made a decision to quote f.o.b. destination prices rather than f.o.b. mill prices. It was a practice that came into operation gradually, and, as I have already testified, in the course of terminating our distributor arrangements we found a great many instances in which the distributors were making their sales at f.o.b. destination prices even though our sales to them had been at f.o.b. mill prices.

Now, in such cases we merely continued to do direct to the dealers what the distributors had done before; that is, quote them delivered prices." (Tr. 27193-94)

4. Increasing Numbers of Cement Mills and their Spread Westward

The growth of new cement plants in the Lehigh Valley has already been described.[1] For a time these mills in the Lehigh Valley shipped their cement to all sections of the United States.[2] This continued even after new plants were built in other areas because for a time it was commonly believed that the Lehigh Valley was the only locality where high-grade Portland cement could be manufactured and early preference for Lehigh Valley brands persisted.[3]

In 1900 mills in the Lehigh Valley produced more than 72% of the country's total production and the Atlas plant at Navarro (Northampton), Pennsylvania, was the largest cement mill in the United States.[4] Between 1900 and 1910 a number of plants were built outside the Lehigh Valley. By 1907 these outside mills produced almost 50% of the total domestic production and by 1910 had increased that proportion to 65%. By the latter year there were some 125 cement mills of which approximately 100 had been located outside the Lehigh Valley in 28 states including Ohio,

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[1] See Part I, pp. 42 *et seq., supra.*

[2] Bowen, Vice President, Lehigh (R) Tr. 26590.
Hanahan, President, Volunteer (R) Tr. 38630.
Com. Ex. 2878 K-L: Extracts from Wheeler Committee Hearings, 1936.
Resp. Ex. 3743 A-B: Id.

[3] Resp. Ex. 425 F-G (pp. 6-7): Excerpts from article "Progress in Cement Industry", 1924.
Bowen, *supra*, Tr. 26563-65.
Coogan, Vice President, Alpha (R) Tr. 23101-02.

[4] Resp. Ex. 3488 A-B: Tabulation showing Portland Cement production in Lehigh Valley compared with total U. S. production, 1890-1937.
Brobston, President, Hercules (R) Tr. 26071-72.

Indiana, Illinois, Michigan, Missouri, Iowa, Kansas and several southeastern states.[5]

Early cement prices from the Lehigh Valley mills were quoted f.o.b. mill at the Valley as already noted.[6] These mills were soon all given the same freight to all points outside the Valley as the rate from Northampton (or Navarro).[7] At or about this time, the f.o.b. mill prices emanating from the Lehigh Valley began to be characterized as the Lehigh Valley—and sometimes the Navarro or Northampton—"base".[8] This also was the period of growth of new mills in other sections.

Mr. Coogan testified regarding the influence on pricing methods of the growth of new mills outside the Lehigh Valley as follows:

> "Q. Mr. Coogan, when we adjourned last night, you had testified that the development of the use of the delivered prices by your company occurred during certain periods. I think you gave 1902 to 1912. I am not sure that you stated the circumstances surrounding the factors as to the development of the delivered price.
>
> I would like to take that up this morning. A. Do you mean what caused this development?
>
> Q. Yes. A. Well, there were three principal contributing factors. The first one, perhaps, the building up of new competition in other sections of the country. The change in the method of marketing

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[5] Resp. Exs. 3488 A-B, 3764 A-E (Tabulations); Com. Ex. 3235 Z37 (Minutes of Meeting of Association of American Portland Cement Manufacturers, 1908).

[6] See pp. 104-108, *supra*.

[7] Bowen, Vice President, Lehigh (R) Tr. 26744-45.
Coogan, Vice President, Alpha (R) Tr. 23097-98.

[8] Coogan, *supra*, Tr. 23101-02.
Koch, Vice President, Lone Star (R) Tr. 32650-51.
Nelson, Vice President, Wolverine (R) Tr. 35875-79.

cement; that is, the evolution from the getting away from the general sales agent to the distributor, and from the distributor and selling direct to the dealer and consumer trade was second; and last, perhaps, one of the most important factors, the third one, was the customer's demand for knowing what the cement was costing him and what it was going to cost him laid down at his particular destination. (Tr. 23096-97)

* * *

Q. Now, what was the rate quoted from, was it quoted from Northampton or from some other point from where you shipped something? A. Generally speaking, the rates from the Lehigh Valley group were blanketed as to point of origin and as to point of destination, except too, perhaps a few, and a very few strictly local points where the freight rates from different mills in Lehigh Valley might differ, but they were not large consuming points, and so far as our company was concerned, we used on our quotations, Northampton rates because then we figured what the center of the group was and instead of rates for that particular point, inasmuch as rates, for the most part, were the same, we simply used one rate in figuring our prices out of the Lehigh Valley.

Q. Does that mean that your rates from Northampton would be similar or would be the same or in the same group, or not the same as your rates from Alpha, New Jersey, and from Martins Creek, Pennsylvania; for instance, Mr. Coogan? A. It would be exactly the same to all but a few local points where there was a little or no cement consumption, and in quoting to those points, we also used rates from Northampton. (Tr. 23097-98)

* * *

Q. Mr. Coogan, during the early 1900's what was the situation as to delivered cost to the purchaser from the Lehigh Valley, if you know? A. Well, during the early 1900's, we used both pricing methods. That is, we quoted sometimes a mill price and at other times we quoted a destination

price; and when we quoted a destination price, we used the Lehigh Valley rate as the base and quoted the price at destination plus freight rate from the Lehigh Valley.

Q. Now, you told me that subsequent to that time, new mills were established west of the Lehigh Valley. A. Yes, sir.

Q. What was the situation with regard to delivered cost to the purchaser at that time? A. When new mills were first established, according to my recollection, they began making prices on Lehigh Valley base, plus the freight rate from the Lehigh Valley and quoted that as their destination price and so we tried to quote the same price.

Q. • • • What was the first mill established west of Lehigh Valley? A. I am not sure whether it was the old plant of the Illinois Steel near Chicago, or whether it was the Hannibal plant.

I am not sure which one was the first, but I think it was either one of those two.

Q. Did the establishing of those new mills affect your price in any way—I mean, were you able to get your cement in that territory near those mills—what was the situation after these mills were established? A. Well, when these mills were established, there was some prejudice against their products. That is, at the time a great many people thought that the best cement was made in Lehigh Valley, and they ran into some prejudice, the same as eastern manufacturers ran into imported cement when they first started business, and for a time we were not much worried about shipping our cement into that market and we didn't always have to meet the prices being quoted by our competitors to the West. (Tr. 23100-02)

• • • •

Q. • • • Can you tell us then, whether the establishment of these mills at the outset had any effect upon the method in which you quoted prices in that territory? A. Of course, in order to meet the competition of these new mills as they started in, they began quoting for the most part delivered

prices, and while we had sold in that territory previously on mill prices, after they started up, we were soon compelled to quote delivered prices so that a customer could compare the cost of the two cements.

Q. How did that affect your prices, as to whether they became higher or lower? A. It had a tendency to bring our prices a little lower, because the new mills, in figuring for a while, used Lehigh Valley freight rates in arriving at their destination prices.

As the mills became more numerous, they began to use basing points of their own, which of course lessened freight rates and had a tendency to reduce the delivered price to the customer. (Tr. 23103-04)

• • •

Q. Now, as to these new mills, did you give any attention as to how they were figuring their prices, Mr. Coogan? A. Yes, we certainly did. We had to. We have to try to keep in touch with the competitive situation and make every effort to find out how they quote their prices.

Q. And at that time, what did you find out as to that? A. Well, at first we found out that they were using a price in the Lehigh Valley and adding the Lehigh Valley freight rate, but as more new mills came in, we found there were new basing points being used for figuring delivered prices, and when we found that out, of course, we had to change our method and quote delivered prices competitive with theirs.

Q. About what time, if you can fix the year, when did you find that your competitors, as well as yourself, were quoting delivered prices almost exclusively, as you have just told us, Mr. Coogan? A. That was about the same time that we started quoting delivered prices. I should say some time after 1910, probably about 1912. (Tr. 23106-07)

• • •

A. Might I go on and state here that in 1916 we were carrying basing points at a number of South Atlantic and Gulf ports, because at that time we shipped our cement by water to the various ports and shipped it inland from there because at the

time there was not much competition in the southern markets and we were able to handle our cement that way.

As the plants began to grow up in the South, of course we had to drop that method of shipping our cement there, and that method of pricing the cement, because we found the mills there using their own mills as basing points and we had to meet their prices. Therefore, we started using southern mills as bases instead of southern and Gulf ports." (Tr. 23111-12)

Blaine Smith explained the matter to the "Wheeler Committee" as follows:

"* * * With the increasing demand in the interior, certain manufacturers in the Lehigh Valley built new plants in the West in the hope of benefiting in the form of extra profits from the relatively high freight rates from the Lehigh Valley as compared with those from the new locations. New persons and new capital also built new plants for the same reason. All of them continued, as long as they could, to sell at prices related to the prices asked in the Lehigh Valley plus freight to destination. New fields of use for cement developed and the demand increased in volume. So, instead of large contractors and jobbers being the principal buyers from the manufacturers, building supply dealers and lumber dealers in towns large and small, as well as the greatly enlarged number of contractors, came to buy it and store it to supply the day-to-day demand. There are now about 35,000 cement dealers in the United States.

Concurrently, more new plants came into existence and competition became more active. In time capacity to produce cement in the interior exceeded the demand, and thereupon, one by one, many of the new plants established their mills as basing points in order to freeze out particularly the product of the mills in the Lehigh Valley and, to some extent, that of other mills in the interior. First, the new mill at Hannibal, Mo., became a base point; then the

new mill at Iola, Kans.; then the new mill at Mitchell, Ind. Demand fluctuated from year to year; new plants continued to be built; and the same process continued. * * *" (Com. Ex. 2878 D; Resp. Ex. 3745 B)

B. F. Affleck also told of the development westward and its effect in his testimony before the "Wheeler Committee":[9]

[Italicized part quoted in Fdgs. Par. Seven (h)]

"In 1901 the Atlas Portland Cement Co., which had built and was operating one of the first plants built in the Lehigh Valley, began to build a large plant at Hannibal, Mo., on the Mississippi River, 100 miles north of St. Louis. The purpose was to better serve the Western territory and to make more profit.

The company then announced it would name all prices delivered instead of f.o.b. mill, and for a time these prices were based on Lehigh Valley base plus freight, the difference between freight from Lehigh Valley and from Hannibal going to increase profits of the Hannibal plant, the customers paying no more than before but getting better service.

The plant was promptly doubled in capacity and other plants were built in Michigan, Illinois, Kansas, and elsewhere. Due to this competition, a base was established at Hannibal, but as costs in the West were higher than in the Lehigh Valley this base was considerably higher than at Lehigh Valley. There were then two basing points, Northampton, in Lehigh Valley, and Hannibal, in Missouri.

The first plant built in the so-called Kansas gas belt in southeastern Kansas was at Iola. Gas was extremely cheap at first, and Iola cement was sold at delivered prices based on Northampton and/or Hannibal, plus freight. This plant was so profitable that a great number of other plants were promoted in this gas belt, and something like 15 were built wholly or in part. This productive capacity was so large and competition so keen that prices fell

[9] See also Affleck testimony in Resp. Ex. 3743 A-B.

off the bases of Northampton and Hannibal and an Iola base was established.

There were then three basing points: Northampton, Hannibal, Iola. As time passed, other plants were being built in Pennsylvania, Michigan, Indiana, Ohio, New York, Alabama, Texas, California, and in other states. Each plant was usually small in capacity at first, and it naturally sold at the delivered market prices prevailing in its territory based on other older, larger mills. As the new mills enlarged their capacity, however, and still other new mills were built, competition gradually made it difficult to hold prices up to previous levels and, therefore, one by one more and more mills or groups of mills became basing points.

The point I seek to make is that the delivered-price practice was one of growth, covering a period of three or four decades. This development was natural, not artificial, and no one has ever proposed any other complete plan nor, in my opinion, based on many years of experience and observation, is there any other workable plan than this ancient and natural plan." (Com. Ex. 2878 K-L)

Vice President Koch of Lone Star told of his experience in the southeast beginning in about 1907:

"Q. Now, you mentioned having become sales manager of the Dixie Portland Cement Company and having charge of the sales from the time that the mill at Richard City went into operation. A. That is right.

Q. What was the condition in the sales territory where that mill sought sales as to sales f.o.b. mill or f.o.b. delivery point? A. Well, I found a condition to the East, the Carolinas, and into Georgia, down into Alabama, Tennessee, where the trade was being quoted a price sometimes by the Lehigh Valley with an estimated freight to the destination; sometimes the quotations were made f.o.b. Fordwick with an estimated freight rate to destination; other times the prices were quoted f.o.b. car Charleston on arrival of the steamer—I might say Charleston-Savannah, and another price f.o.b. warehouse Charleston-

Savannah, after the steamer is unloaded; and again there either would be given an estimated freight rate per hundred, or no reference made to it whatsoever.

That condition applied, I would say, over toward Mississippi. As you came over toward the State of Mississippi and Louisiana you began to find f.o.b. destination prices, coming down from the Kansas field and the Missouri field. (Tr. 32650)

• • •

Q. Now, we have been discussing the situation as existed in the southeast in 1907.

Now, when did the Richard City plant of the Dixie Portland Cement Company go into operation? A. We went into operation, I think, late in 1907. • • • I think we made our first shipments in February, 1908.

Q. Now, on what basis did you sell the product of that plant? A. I immediately began selling f.o.b. destination, and put out my quotations accordingly.

Q. Now, that, then, was a new method in that particular area, was it not? A. It was.

Q. And what did your competitors do? A. Well, they hung on to their method as long as they could. Gradually the f.o.b. destination became the method generally pursued.

Q. Now, what reasons did you have in mind, Mr. Koch, at the time you decided to sell the product of the Richard City plant on a delivered-price basis? A. Well I always felt that the customer was interested in what the cement was going to cost him where he was going to use it. On the other hand, I wanted him to know what my price was there, and I wanted him to use my price to compare with the other man's price. It was quite obvious that if the average buyer knows—and if he did not know what the other man's stuff cost, and he went to a lot of trouble to find out—that he would be happy to take mine, because I guarantee the cost to him delivered to his point.

Q. Prior to the time you took charge of the sales with respect to the Richard City mill, you had experience in the West—— A. Yes.

Q. —with respect to selling at delivered prices, did you not? A. That is right.

Q. Did you find that your experience with delivered prices in the West was favorable? A. Oh, very, very.

Q. And what reaction did you find from the dealers with respect to the delivered price initiated by you in the Southeast? A. Well, I felt I met with a very favorable reaction; in fact, with our method, our sales method, so that that plant later on became quite a profitable property." (Tr. 32654-55)

John L. Nelson, Vice President of Wolverine had his early cement experience beginning in 1906 in the sales department of the Cement Department of The Illinois Steel Company, which later became the Universal Portland Cement Company.[10] His testimony on the development of delivered prices in the Chicago and Pittsburgh areas follows:

CHICAGO:

"It is my recollection that in 1906, when I became associated with the Cement Department of the Illinois Steel Company, we were meeting the destination prices of our competitors, the most important of which were the mills around LaSalle, the Atlas mill at Hannibal, and the mill in St. Louis operated by the predecessor of the Missouri Portland Cement Company. These mills served the same territory served by our Buffington mill. It is my recollection that we gave each salesman a minimum figure below which he was not allowed to quote, and we tried to secure a satisfactory net at our mill based on the daily average mill net which we were then receiving.

At that time I do not recall any request for f.o.b. mill prices. We gave each salesman the freight rates from our mill and competitive mills to points in his territory so he could quote delivered prices.

In so far as the territory around Chicago was concerned, competing cement companies appeared to be employing a somewhat similar method in ar-

[10] (R) Tr. 35872-73.

riving at the prices which they would quote to customers at a given destination. * * *" (Tr. 35874)

PITTSBURGH:

"I went to Pittsburgh in May, 1907, at which time the Universal Portland Cement Company was building a plant at Universal, Pa., just outside of Pittsburgh and referred to as the Pittsburgh or Universal mill. * * *

The plant at Universal was built to use the slag from the Carnegie Steel plant, to take advantage of the cement prices in the Pittsburgh and Ohio territory and because of its advantageous location freightwise to the Ohio and Western Pennsylvania markets as compared with the Lehigh Valley mills.

The Pittsburgh plant produced the first clinker about Thanksgiving 1907. The first cement shipments were made in the early part of 1908. From the Universal mill at Pittsburgh we solicited and endeavored to sell Universal cement at destinations east of the Indiana-Ohio line, south of the Michigan-Ohio line and to destinations in the eastern and southeastern United States where we could receive a satisfactory net on our sales. Sales west of this territory were handled by the general sales office in Chicago. Shipments to eastern territory were usually made from Universal and in the West from the mill at Buffington, Indiana.

Prior to the time the plant was in operation, a small amount of cement was shipped to Pittsburgh for the purpose of demonstrating to dealers and contractors the type of cement which we were going to manufacture.

We found that there was some consumer prejudice against Universal cement since slag was used in its manufacture. * * * Because of this prejudice against our cement, the price for Universal cement of necessity had to be at least as low as that quoted by any of our competitors whether sold direct by the manufacturers or through distributors.

In contacting prospective customers, dealers, consumers, etc., the salesmen learned from the trade what prices they had been paying, and the terms

and conditions of sale then in use. We found that delivered prices were usually quoted at various points in the Pittsburgh area and that they tended to conform to a uniform net at the Lehigh Valley mills plus the freight rate from the Lehigh Valley district. This did not leave us any lee-way in quoting delivered prices above the figures which the Lehigh Valley mills were quoting. We found that up to the time the Pittsburgh mill was built, the Pittsburgh market was generally supplied by the Lehigh Valley mills, but that there were also mills at Middle Branch, Baybridge, and Castalia, Ohio, Wampum and New Castle, Pa., Fordwick, Va., and Manheim, W. Va. We did not find any customers in the Pittsburgh market who requested prices f.o.b. our mill or f.o.b. Lehigh Valley mills and we found that they were requesting delivered prices.

At the time the Pittsburgh plant started, some of the companies located in the Lehigh Valley were making their sales in the Pittsburgh area by means of distributors. We found that those distributors sold solely on the delivered price basis. . . .

The first sales we made at Pittsburgh were made on a delivered price basis. I do not recall that we were ever asked for an f.o.b. mill price, nor that we had a policy against selling to any one on an f.o.b. mill basis had we been requested to do so. We were asked by customers for delivered prices.

It took us some time to break into the Pittsburgh market. At that time our sales were made at the same price as was being obtained by the Lehigh Valley mills. About the time we became well established one of the companies in the Lehigh Valley reduced its prices in the Pittsburgh area. Universal met these price reductions. The Lehigh Valley mills then sold at delivered prices, reflecting a higher net in eastern Pennsylvania than in the West. Other reductions followed and the meeting of such reductions by Universal was repeated until the Lehigh Valley net which was used on sales in Pittsburgh area was the same as that used on sales in the East. As prices were reduced, Universal extended its sales effort east and quoted and sold at delivered prices

with a net equal to the Lehigh Valley net which the Lehigh Valley mills had used on sales in Pittsburgh, western Pennsylvania and Ohio.

As competition by Universal continued and the prices were reduced by Lehigh Valley mills, we found that the companies in the Lehigh Valley eliminated their distributors and were making their sales direct in the Pittsburgh market. We also found that the Lehigh Valley companies took over the marketing practices and methods employed by their distributors and quoted and sold at delivered prices in our trade territory. Most of these distributors then became local dealers.

As our sales efforts became more intense and business increased the Lehigh Valley mills were able to get a smaller percentage of the business in the Pittsburgh area. As freight rates increased and, because of our service advantage, we were able to increase our percentage of the tonnage and the Lehigh Valley mills were able to get less and less tonnage in the vicinity of our mill.

By 1913 the Lehigh Valley mills were forced to meet our competition in western Pennsylvania and Ohio at which time we quoted our prices based on a figure at our mill plus the rail freight rate." (Tr. 35875-79)

Executives of some of the companies which were organized in more recent years gave evidence as to the origin of their use of delivered prices. Cumberland was organized in May, 1929.[11] Frank Pearson, Secretary-Treasurer and a Director of the company since its origin, who testified that he was familiar with and was consulted in connection with the sales and price policies of the company, explained how the company came to sell at delivered prices thus:

"A. When the Cumberland Company was organized, and those who were promoting it being inexperienced in the business, they employed an experienced sales manager and a general manager, who

[11] Pearson, Secretary-Treasurer, Cumberland (R) Tr. 39810.

had had previous experience. The direction of sales was left in their hands, and they developed marketing policies, which were used at that time, and they have been continued.

Q. Did your directors or the officers give any consideration to starting out to sell cement in some different way from the way you observed that it was being sold? A. No, sir.

Q. Did the officers or directors, to your knowledge, at that time, receive any assistance from any other cement manufacturing companies with respect to finding a sales manager, or anything like that? A. They did not." (Tr. 39820-21)

His related cross-examination follows:

"Q. You mean to say that you gave no thought to the pricing methods employed in the industry at the time you started your mill? A. We knew nothing about pricing methods.

Q. You made no inquiry to find out the number of mills whose competition you would have to meet in selling the territory into which you might go? A. At the time the Lumber Company decided to build this cement plant, I am sure that that was not given consideration.

Q. In other words, you went into the business without taking any account of the methods of pricing or the kind of competition that you would encounter; is that right? A. That is right.

Q. You did not know at the time you went into the business that there was such a thing as a basing-point method of selling cement? A. We found that out later.

Q. You did not find it out before you went into it? A. No, sir.

Q. You found it out after you started selling cement? A. No, sir.

Q. You did find it out before you began to sell? A. Yes, sir.

Q. You employed a man who is familiar with the methods employed in the industry with regard to pricing? A. I am sorry; I did not get that question.

Q. I say, you employed a man, did you not, to handle your sales who was familiar with the pricing methods used in the industry? A. Yes, sir. We did not hire him primarily for that purpose.

Q. That was Mr. Dalbey? A. No, sir.

Q. Who was that? A. Mr. R. T. Miller.

Q. With whom had he worked before? A. He had been with—he came from the Hermitage Portland Cement Company to our company." (Tr. 39899-900)

Wood, General Manager of Green Bag, W. Va., organized in 1915, testified that his company used destination prices because that is "what we found" (Tr. 29513-14).

McKee, Vice President of West Penn, which began to operate in 1927[12] found delivered prices in its area being quoted based on Universal, Pa., and it did likewise. (Tr. 27695)

F. B. Warren who became Sales Manager of Bessemer in August, 1936 (Tr. 32018), his first connection with a cement company (Tr. 32044), and Vice President in charge of sales in December, 1936 (Tr. 32018) testified that he continued to quote and sell at the prices which he found Bessemer had been using theretofore. (Tr. 32097-98)

5. The Buyers' Position

It was conceded at the hearings that all cement purchasers buy cement on the basis of the laid down cost to them at destination or place of use of the cement.[1] The proof on the point and the concessions by counsel and the Trial Examiner are set out fully in the discussion of reasons for the use of delivered prices beginning at p. 176, *infra*. The evidence bearing on the historical significance of this fact in connection with origins of delivered prices only, is collected here.

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[12] Resp. Ex. 3765: List of new mills.

[1] (R) Tr. 28048, 32134, 32140-41, 32672-73, 36299, 36734-35. Resp. Ex. 3765: List of new mills.

Alpha's Vice President Coogan said this was "perhaps one of the most important factors" in the origin of delivered prices.[2] On cross examination he was examined further on this question:

"Q. You testified to developing a delivered price method of quotation and sale because your dealers preferred it.

Can you say how generally extensive that desire on the part of the dealers was? A. Well, I should say it was quite general, that they wanted to know, in every case, what the freight rate per barrel was, and, in most cases, they preferred a delivered price. (Tr. 24456)

* * *

Q. Well, in 1903, as shown by one of your exhibits, you quoted the mill price to dealers and showed on it the freight per barrel to the dealers' destination. What advantage did the dealer have in having a delivered price compared to that method of quoting? A. I testified that we quoted both ways in 1903, and based on the experience gathered from the different methods of quoting we decided that it was the better way for us to handle our business to quote these delivered prices after knowing how our customers felt about it.

By Mr. Wooden:

Q. Well, wouldn't a mill price with freight per barrel shown to destination give the dealers everything they wanted to know about a delivered price? A. Evidently it did not, because the dealer asked for delivered prices." (Tr. 24458-59)

Hanahan, President of Volunteer, who in 1900-1905 was operating a cement distributing company, in response to a question as to why he sold at destination prices at that period, said:

"A. Well, because the man who bought it wanted it at the destination, and he wanted to know what it

[2] (R). Tr. 23096-97.

was going to cost him at the site of the work. He was not acquainted with water rates, rail rates, and combination rates. At those times we got some special rates.

Q. You mean the railroad would make special rates? A. Yes. They would make a special rate for a job at a certain point.

Q. In delivering the delivered price to your dealer and contractors, how did you determine what delivered price you were going to quote a customer at a given time and given place? A. Well, if the goods were going to be shipped from the port we knew the region in which the material was going to be used, we knew the going price at that point, and we added the freight to the destination point from the ports, and if it was lower, the selling price there was lower than we could deliver it, we had to get out of the business. If it was higher——

Q. You say lower—had you finished? A. It was higher we tried to meet the lowest price prevalent at that point." (Tr. 38629)

Lehigh's Vice President Bowen described the effect of the early customers' desires as follows:

"A. • • • Let us say that we were selling a distributor at the price of 80 cents f.o.b. mill. The distributor's freight rate to an important market in his territory was 50 cents per barrel. That gave him a cost at destination of $1.30 to which his profit had to be added.

He found he could sell in that market a substantial quantity of cement. That in order to do so, to meet the competition in the market, he would have to sell this cement at $1.20. The distributor came to us and said: 'I can make a sale, but I can't make it at the price that I have got. I won't be able to take my commitment from you unless you make an adjustment whereby I can meet that competition', whereupon, in many cases, such an adjustment was made if the business seemed sufficiently desirable, and whether that reduction was made, as it was in some cases, by reducing his f.o.b. mill prices, or whether it was made, as it began to be made in an

increasing number of cases, by giving the distributor an f.o.b. destination price, the fact remains the adjustment in every case was made in order to meet a competitive situation existing at the destination.

Q. To whom did the distributors sell, then, Mr. Bowen? A. Dealers, contractors, railroad companies, consumers." (Tr. 26625)

Brooke, Monarch's Vice President, said the old Kansas Cement & Material Company with which he had been associated in 1914, quoted f.o.b. destination prices and that he could not recall any requests for mill prices from customers at that time.[3] Horner, President of Kosmos, said his method of quoting prices in 1908 was "essentially the same" as his present method.[4]

Affleck, former President of Universal Atlas, and Sales Manager of the Cement Department of Illinois Steel Company at the turn of the century, testified as follows:

"Q. Was there a time in those early days of your connection with the company when cement was sold on an F.O.B. mill basis rather than delivered? A. No.

Q. You always sold directly on a delivered basis? A. Practically so.

Q. Well, what do you mean by 'practically so'? A. Well, the customer wanted the price delivered where he was to use the cement, and we naturally fell in with his desires and sold delivered.

Q. In what cases didn't you sell delivered? A. Well, I don't—as a matter of fact, I don't think there are any cases where we didn't sell delivered. There was no demand, no request for anything but delivered prices." (Tr. 13034-35)

Koch, Vice President of Lone Star, testified that he inaugurated delivered prices at the Richard City plant of the Dixie Portland Cement Company in 1907 when he was

[3] (R) Tr. 42205.

[4] (R) Tr. 36878.

associated with that company. He stated his reason as follows:

> "A. Well, I always felt that the customer was interested in what the cement was going to cost him where he was going to use it. On the other hand, I wanted him to know what my price was there, and I wanted him to use my price to compare with the other man's price. It was quite obvious that if the average buyer knows—and if he did not know what the other man's stuff cost, and he went to a lot of trouble to find out—that he would be happy to take mine, because I guarantee the cost to him delivered to his point.
>
> Q. Prior to the time you took charge of the sales with respect to the Richard City mill, you had experience in the West—— A. Yes.
>
> Q. —with respect to selling at delivered prices, did you not? A. That is right.
>
> Q. Did you find that your experience with delivered prices in the West was favorable? A. Oh, very, very.
>
> Q. And what reaction did you find from the dealers with respect to the delivered price initiated by you in the Southeast? A. Well, I felt I met with a very favorable reaction; in fact, with our method, our sales method, so that that plant later on became quite a profitable property." (Tr. 32655)

For other general evidence relating to early influence of the buyer's position see Coogan, *supra* Tr. 23046-48, 23096-97; Nelson, Vice President, Wolverine Tr. 35874, 35878.

6. The North American License Agreements and the Association of Licensed Cement Manufacturers

The details regarding the licensing agreements (1906-1911) and the formation of an association of sixteen manufacturers in the northeastern section of the country in 1907

for conducting operations under the patent licenses are set forth elsewhere.[1]

These patent licenses were operating during the period that delivered prices were developing in the cement industry. [Among other things the schedules which were part of the license agreements provided for the use of delivered prices by the licensees in the sale of cement manufactured under the patent. Paragraph (1) of Schedule "A" provided:

[Italicized part quoted in Fdgs. Par. Seven (j)]

"Prices—*all prices quoted for Portland cement covered by the License Agreement of which this schedule is part made by any of the parties to said License Agreement shall be prices for delivery at the point required by the purchaser* and no such cement shall be offered for sale and delivery at any point or in any section covered hereby or sold and delivered or otherwise disposed of at any such place at such prices less than the price set after the delivery point or section in the list of delivery points and sections contained in Paragraph 10 hereof, or, if such delivery point or section be not specifically contained in said list, at less than the prices hereinafter otherwise provided covering such place. * * *"]

[Paragraph (10) of Schedule "A" provided in part that:

"Until the Licensor shall give notice of establishment of delivery points and sections and minimum prices therein, all prices in Territory A shall be as follows:

All prices given below are the minimum prices to consumers and subject to the discounts permitted to dealers and distributors by Paragraph (2) of this Schedule and no other discount.

All prices shall be quoted and made delivered.

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[1] Part IX, Sec. C.

[2] Com. Ex. 3196, p. 768, *et seq.*

> Delivered prices for wood and cotton shall be the same and for paper 25 cents less, computing the freight at a weight of 400 lbs. for all packages.
>
> Prices in Territory A shall be not less than $1.20 in wood and cotton and 95 cents in paper plus the Northampton all-rail rate with the following exceptions: * * *". (Com. Ex. 3196-2 Y)

Territory "A" was roughly the eastern seaboard from Maine to South Carolina and westward to a line through Rochester, N. Y. and midway between Northampton and Pittsburgh, Pa.[3] This was the only section in which the Agreement operated.][4]

The evidence as to the effect of the license agreements, if any, upon the pricing methods of cement manufacturers is as follows:

[Brown, then President of Alpha in an interview with investigators of the Federal Trade Commission in 1929 said:

> "The Hurry & Seaman patent-license arrangement, which provided among other things that the licensee should sell only at delivered prices, was frankly an attempt to stabilize conditions in the cement business. It was an agreement however, though entered into in good faith as to its lawfulness at that time, based upon what was then thought to be legal under the patent law."] (Com. Ex. 1174 I)

[Coogan, Alpha's Vice President in charge of sales, whose experience went back to 1902, testified to the following:

> "Q. I notice here in this exhibit, this licensing agreement, Commission's Exhibit 3196, that the agreement fixed the price of cement for the licensees provided that all prices should be delivered prices. —Do you know anything about that provision in the agreement, Mr. Coogan? A. Well, the license agreement simply followed out the practices that were in effect in the industry at that time, and inas-

[3] Com. Ex. 3196, p. 763.

[4] Coogan, Vice President, Alpha (R) Tr. 24934.

much as most of the quotations were made on a delivered basis, they were simply continued on the same basis so as to make as little disruption in the business as possible. (Tr. 24025-26)

• • •

Q. Mr. Coogan, let me put another question as to this agreement:

At the time you entered into it, do you recall whether any consideration was given as to mill prices instead of destination prices? A. No. As I remember it, the general going practice in the industry at that time was to use destination prices, and in order to make as little change in the business as possible that was continued. (Tr. 24027-28)

• • •

Q. Now, did you intend the license agreements to have any effect on the prices of those companies which were not parties to it, Mr. Coogan? A. No, we did not.

Q. Did you observe as of that time whether or not it did have any such effect? A. No, I don't think it had any effect on their prices, from the way I found them in the field.

Q. Now, take your own company. Did the provisions for the use of delivered prices have any substantial effect on your price policy at that time? A. No, I don't think it had any substantial effect on our price policy, because it simply followed the policy which we had been following prior to the adoption of the license agreement. We followed it during the agreement and subsequent to the agreement.

Q. What about basing points? Did it have any effect on the Alpha Company's use of basing points in quoting delivered prices? A. No, I don't think it had any effect on basing points, because the matter of basing points had been pretty clearly established in the industry prior to the Code.

Now, you will notice, of course, that years after the Code the number of basing points, due to new

production and new mills, was very greatly increased, but I don't think that in so far as the license agreement, in and of itself, had any effect on the matter of basing points.

Q. Mr. Coogan, you have just used the word 'Code' in your answer. Did you mean license agreements? A I meant license agreements, yes. (Tr. 24030-31)

• • •

Q. Do you know, Mr. Coogan, offhand—can you tell me whether this license agreement—there has been considerable discussion here as to what has been known as the old Cement Case. Do you know whether this license agreement was in that case or not? A. Yes. I am sure that the license agreement was presented in the old case.

Q. Let me ask you this: After the license agreement was terminated on January 1, 1911, as you have described, what was your experience and observation? Was the agreement continued or followed, or did it affect your subsequent practice in any way? A. No. The license agreement was entirely dropped on January 1, 1911, and after that time it had no effect whatever on our policies." (Tr. 24033-34)]

There was no other direct evidence on the subject. There is abundant evidence concerning the extent of the use of delivered prices during this period. Coogan of Alpha testified that his company quoted delivered prices "from 1903 on" but did not have "an absolute fixed policy until some few years after 1903"; by 1910 it had "become entirely general in our company."[5] Brobston of Hercules testified that by 1910 delivered prices had become the general method of doing business in the industry.[6] Bowen of Lehigh testified that Lehigh "was not quoting delivered prices exclusively until 1913, and perhaps 1914"; that

[5] (R) Tr. 23107.

[6] (R) Tr. 26424.

prior to then Lehigh quoted delivered prices "in some cases" and in a decreasing number of instances mill prices.[7] In the west, where the license agreement was not operating, Oklahoma was selling at destination prices in 1908.[8] For other evidence on the development of delivered prices during this period see Sections 1-5, pp. 97-134, *supra*.

7. Early Trade Association Activities

a. The Association of American Portland Cement Manufacturers

The Association of American Portland Cement Manufacturers (hereinafter called the AAPCM) the earliest trade association in the industry, was in existence during the period from 1902 to 1916. Its history, membership and activities as shown by the evidence are given in Part IX, A, *infra*. The evidence digested at this point is confined to references to prices or methods of pricing which occurred in the course of the activities of the Association. The evidence in the main consists of excerpts from minutes of the Association which were produced in the hearings before the Commission from the records of the Department of Justice relating to the case of *United States* v. *Cement Manufacturers Protective Association*. They are contained in Com. Exs. 3235 A-Z 114 and 3236 A-Z 107, and were admitted in evidence over respondents' objections as to competency.[1]

[At the meeting in June 1904, the following is recorded:[2]

"Mr. Prentice (Castalia): As far as my Company is concerned, the question has frequently arisen as to the benefit to be derived by meeting here quarterly, as we have been doing, and also of the value

[7] (R) Tr. 27189-90.

[8] Thompson, Sales Manager, Oklahoma (R) Tr. 46484.

[1] (R) Tr. 35440-49, 35623-29.

[2] Com. Ex. 3235 R-S.

of belonging to the Association. I believe that something can be done, and should be done, to improve prices on cement, or if this is out of the question, to at least curtail the production. I am satisfied that we could get at least 25 cents per barrel more for our cement than we are today getting, if we had an organization like other Manufacturers in other lines; they have selling arrangements by which they can get a much better price, but under our regime it seems like that much money thrown away."]

It does not appear that any action was taken.

[At the second annual meeting in December, 1904, the following was reported by the Executive Committee:[3]

"The year just closing has been one of the most unsatisfactory in the history of the industry. Owing to a large accumulation of cement in the storehouses at the mills, an unusually large stock of foreign cement in the warehouses in the cities along the Atlantic Coast, to a late spring, and labor troubles in the building trades, the manufacturers found it necessary, in order to move stock, to name the lowest prices ever quoted for American Portland Cement. The tendency of the market was downward until midsummer, when the surplus stocks having been largely disposed of, a halt was called and prices remained stationary until September, when a slightly increased demand induced some mills to make a feeble effort to advance them.

That the year's business has proved unprofitable is beyond question and that it is due entirely to the failure of manufacturers to get together is evidenced by the fact that the consumption has just about equalled the supply and that the mills will close the year with no more cement in the bins than should be carried to insure a well-seasoned product.

The coming year promises an increased demand and at the same time an increased production. To obtain better prices, it is absolutely necessary that we should refrain from stocking up during the

[3] Com. Ex. 3235 T-U.

Winter months and avoid, as far as possible, the naming of prices in advance for next season's delivery."]

[Subsequently, at the same meeting, Mr. Dumary of Helderburg (no longer in existence) stated:[4]

[Italicized part quoted in Fdgs. Par. Seven (i)]

"• • • *The main grievance which the Association has here today is the grievance for a uniform price for cement. I feel that I can safely state that two-thirds of those present today are ready to adopt any proceedings that will advance and keep the price of cement where it should be, and if there is any member here who has the ability to present to the Executive Committee something that will accomplish this, I assure them that the Executive Committee will do all in their power to put it in force. Now it is in your hands—not in the hands of the Executive Committee—and I agree with you, and will sustain any motion that will advance the price of Portland cement for the year.*"]

[At the same meeting, Mr. A. St.J. Newberry of Sandusky (now out of existence) stated:[5]

"• • • Referring now for just an instant to a subject lately urged in our discussion, I want to say for ourselves most positively that we think the present condition of the cement industry requires an agreement on the part of the principal producers, fixing the minimum selling price at the works, according to the nature of the business in the various districts, and that that price should be so fixed that cement cannot be sold below cost. There is no question at all that at the present time, although the demand for cement is practically equivalent to the supply allowing for the variations due to the seasons, that a lot of producers are selling cement today at a great deal less than cost, and that this is bad for the whole industry."]

[4] Com. Ex. 3235 U.

[5] Com. Ex. 3235 V.

[Later at the same meeting, the following occurred:[6]

[Italicized part quoted in Fdgs. Par. Seven (i)]

"Mr. Hampson (Nazareth): *Now if we are going to accomplish anything in the matter of prices, I believe the right place to do it is here. If we are men enough to get together, and if we can trust each other here in this room, we can have our Executive Committee appoint a few among themselves to get together and feel the market, and say what the market price should be; what they estimate the price should be, and then send out circulars to the different members of this Association on that line.*

Mr. Brady (Coplay): *While we are on this subject today we ought to do something practical; according to our By-Laws, we are here for mutual benefit and not for mutual admiration, and I think we can pass a resolution that will be a basis to steady the market for next year * * * I am sure that if we pass a resolution here, fixing a price say to April first deliveries, then increase price for deliveries after that time, and agree right here to do this, that we can carry this through. This is the time and place that this should be done."*]

[The following resolution was then adopted:[7]

[Italicized part quoted in Fdgs. Par. Seven (i)]

"RESOLVED, *That the members of this Association in answering inquiries for prices, confine deliveries up to April 1st, 1905, and quote a higher price for deliveries after that date, and that it is the sense of this meeting that the price should not be less than $1.00 per barrel at the mill for the Lehigh District.*"]

[At the quarterly meeting of the Association in April 1905, Hagar of Illinois Steel reported that in the Spring of 1902 "prices were lower than ever before; they jumped up about 80 cents in two or three months." He added:[8]

[6] Com. Ex. 3235 V.

[7] Com. Ex. 3235 W.

[8] Com. Ex. 3235 W-X.

"There is nothing to prevent prices from going up. We don't need an agreement; simply an understanding for an increase. Don't sell it right now, if you have any left, but just remember that it is quite possible to see this chart repeat itself."]

[Young of Lehigh thought "it would be a mistake if we would force prices higher than an ordinary high level. I do not think the price should go above $1 in the Lehigh Valley" and he added:

[Italicized part quoted in Fdgs. Par. Seven (i)]

"I think in these meetings this question of market conditions is the most interesting thing we can talk on. *You take the Western situation; the remark was made last evening that, likely, Western prices would reach the Lehigh Valley level, and I think that probably that will be the case east of the Mississippi. Our Michigan friends are interested in that proposition, because the West cannot produce sufficient cement for the business that will come up this year in the West. That will tend to bring on shipments from the Lehigh Valley, and will bring the price out in the Middle West (east of the Mississippi) up to the Lehigh Valley level. I think it would be very interesting to hear from some of our Michigan members. In view of the fact that none of us have a very large stock of cement on hand, it does seem to me that we have good reason to congratulate ourselves on the satisfactory condition of the cement business today.*"][9]

One of the Michigan members discussed conditions in Michigan and concluded with the statement that:

[Italicized part quoted in Fdgs. Par. Seven (i)]

"We are trying to follow our Eastern friends in the Lehigh Valley, and we will be very well satisfied if they will keep up their 'nerve'."

[9] Id.

[McCool of Newaygo in Michigan said:[10]

"* * * We have lately issued a schedule of prices on a basis of 85 cents in the Lehigh Valley, adding freight, and this price we can get without any trouble. This is all very encouraging."]

[After further discussion Miller of Dexter made a proposal:[11]

[Italicized part quoted in Fdgs. Par. Seven (i)]

"Mr. Miller (Dexter): *It strikes me that you should appoint a special committee to take charge of the matter of prices and business methods, and to report at the next meeting of our Association. Let the committee take the Lehigh Valley for the ground to work upon; no doubt they represent the largest amount of cement manufactured. It seems to me that it would be well if you would appoint a committee, with the majority coming from the Lehigh Valley, to take this matter in hand, formulate some plan, and get together and have a report for the next meeting at Atlantic City, establishing a uniform method.* Even if it is two months hence, the report of this committee would have a stimulating effect upon the trade. It strikes me that the appointment of a special committee to take up the cement business in general might produce good results."]

[Miller then moved the appointment of "a committee of five to consider the conditions of trade, prices, methods, etc." with three members from the Lehigh district and two from elsewhere. Mr. Hagar (of the Illinois Steel, Cement Department) remarked that any report would be "binding on no one", but Mr. Newberry (of Sandusky) said it perhaps could be "ratified" by the Association.[12] There was

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[10] Id.

[11] Com. Ex. 3235 Z1.

[12] Com. Ex. 3235 Z1.

no response when the question was put to the meeting, whereupon Miller said:[13]

> "Mr. Miller (Dexter): Perhaps it is necessary for me to get up and defend my resolution. • • • It has been deplorable, disgusting, the way business has been done. I have listened to a lot of speeches—some of them frank, and some of them very flowery, and some of them making great promises. When I propose that a committee should be appointed to investigate the situation, recommend certain prices and certain ways of doing business, which you can accept or reject, I certainly am surprised and humiliated to see that the enormous capital that is represented here do not see it in the light that I do. You are drifting around, and floating about, and not adopting anything that you are trying to get at.
>
> The President presented Mr. Miller's motion, above referred to, and the same was carried by a unanimous vote."]

[The original report of Miller's committee is not in evidence (but a modified report was made in 1905).[14] Reference was made to it at the Quarterly Meeting of the Association in September, 1905, as follows:[15]

> "The President: I do not know whether you will remember or not, but at the Atlantic City meeting, when we were discussing Mr. Miller's report, Mr. Bissell, of the St. Louis Portland Cement Company, asked whether it was not possible to collect and disseminate information regarding prices, in order to arrive at an average monthly price. I replied by saying that I thought the Executive Committee would be glad to entertain the suggestion, and if it were practicable to do it, I thought they would be glad to carry it out. I therefore felt duty bound to write letters to the members of the Association to ascertain their views upon the subject. My re-

[13] Com. Ex. 3235 Z2.

[14] See p. 146, *infra*.

[15] Com. Ex. 3235 Z3.

ceived, as they have been recorded, show that the majority of those who did reply were opposed to it, port just read is the result, and the answers re- and as a number of the members did not take enough interest in the subject to reply at all, I am simply reporting to the Association my action in the matter. If you have any further instructions in this connection, I shall be very glad to hear from you; if not, we will consider the matter closed.

On motion of Mr. Warren, seconded by Mr. Harding, the report of the President was received and filed, and the subject considered closed."]

[Italicized part quoted in Fdgs. Par. Seven (i)]

[Later, in the same meeting the President stated that Miller's report "*was adopted at that* [the Atlantic City] *meeting*" and that "*forty-six members signed the report and three, the Atlas Pacific and Standard Portland Cement (not the respondent) Companies have refused.*"[16] At the same time a letter from A. F. Gerstell, Vice President of Alpha was read, which said in part:[17]

"It comes to me pretty straight that there are several, if not quite a number, of cement manufacturers who are not living up to the agreement which we all, with the exception of two or three, signed providing for a change in our terms. This agreement provides that the new terms shall become effective September 1st, and also provides that they shall be strictly carried out for a year unless you are notified in writing to the contrary."]

[It was suggested that if a member heard of a "violation of the agreement" he write to the company for an explanation, which if not satisfactory "can be brought to the attention of the Association through its officers."[18]]

[At the Annual Meeting of the Association in December 1905 the "Miller Committee Report" was again referred to and a copy of the report, apparently modified to elimi-

[16] Id.

[17] Com. Ex. 3235 Z3-4.

[18] Com. Ex. 3235 Z4.

nate reference to prices, was set out in the minutes as follows:[19]

[Italicized part quoted in Fdgs. Par. Fourteen (b)]

"Agreement to Standardize the Customs and Usages in the Cement Trade.

Whereas, We, the undersigned, Manufacturers of American Portland Cement, desire to standardize the customs and usages in the cement trade for the purpose of making all our business transactions more easy, simple, safe and economical;

Therefore, We agree as follows:

Concerning contracts with dealers: To prevent speculative contracts, it is recommended that prices be made good only for acceptance inside of ten days, and in limited quantities; and on shipments for thirty days or less, from time of acceptance only; where dealers have actual contracts on which they desire to bid, particulars of same must be given, when an ordinary contractor's bid can be made.

In case a buyer refuses to carry out his contract, a report of the same is to be immediately filed with the Committee on Claims and Adjustment, and all members of the Association to be notified immediately.

[Italicized part quoted in Fdgs. Par. Fourteen (b)]

Concerning terms of payment: In all cases payment within thirty (30) days after date of shipment from the works to be insisted upon. A one (1) per cent discount for cash to be allowed for payment within ten (10) days from date of invoice. Invoices to be stamped 'Positively no discount on this bill after '. No discount to be allowed on freight and sacks under any conditions. This change to take effect September 1, 1905.

Concerning bags, the following recommendations are made: Bags positively to be paid for with the cement. Discount in no case to be allowed on bags or freight. Count and inspection at mill always to govern. Freight on bags to be prepaid by customers.

[19] Com. Ex. 3235 Z6-7.

It is expressly understood that we do not agree in any way to fix the price or restrict the production, or in any way to restrain or restrict competition in the cement business.

We, the undersigned, agree to be bound by the recommendations above recited, and to live up to the same for a period of one year from this date, unless we formally withdraw from the same in writing.

President: This paper is the substitute, and has been accepted by every member signing the original report, but one. I do not think it necessary that it should be acted upon in any way by the Association, but any suggestions will be gladly received. If there are none, it will be passed over and it will be understood that every member signing the original report, but one, is bound by this substitute.

Mr. Newberry (Sandusky): How long does the agreement remain in force?

President: One year from September 1, 1905, unless formal notice of withdrawal in writing is given."]

[Miller's committee, it seems, became known as the "Committee on Trade Conditions." His report at the September 1906 quarterly meeting closed as follows:[20]

[Italicized part quoted in Fdgs. Par. Seven (i)]

"* * * *Having passed through both the demoralizing and unbusinesslike methods of one year ago, and now experiencing and enjoying the very opposite, viz. a very healthy condition of our trade, there should be no question which method should govern the management of our business in the future. It may be well, however, at this time to caution the members of our Association not to permit the present favorable conditions to lead them into a false position by adopting more stringent and uncalled-for methods, or unreasonably high prices, and thereby create the false impression that a Trust has secured control of our common industry.*"]

[20] Com. Ex. 3235 Z11.

[There is no reference to activity of this committee in the 1907 meeting,[21] nor in the April or June quarterly meetings in 1908.[22] In September of 1908 however, Miller reported again by letter as follows:[23]

[Italicized part quoted in Fdgs. Par. Seven (i)]

"* * * appreciating that something should be done that will bring about better trade conditions, I beg leave to offer the following suggestions, and trust that they may receive kind consideration and bring about new means and methods, so as to improve the present deplorable conditions that have crept into the management of our trade.

I think it fair to assume that the concensus of opinion of the Association is that the lack of unity and co-operation on the part of all the manufacturers in their respective territories is the only lucid explanation of the unwarranted and unfortunate condition which our business has drifted into.

Several things have induced to bring about these conditions, the main ones being:

False reports on the part of buyers and manufacturers as to prices named by competitors.

Wrong ideas as to the quantities of cement on hand.

Lack of confidence in each other; but above all—

Misconceptions as to the motives and methods adopted and now in effect by a large number of manufacturers, particularly those located in the East.

I recommend:

Uniformity in regard to the period during which prices will hold good.

Uniformity in regard to the period in which shipments are to be made.

Uniformity in the terms of payment and discounts to be allowed.

Reservation of the right to cancel any cement not taken when the limit of the period of shipment shall have expired.

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[21] Com. Ex. 3235 Z12-14.

[22] Com. Ex. 3235 Z28-34.

[23] Com. Ex. 3235 Z34-36.

Terms of payment not to exceed 30 days net from the date of shipment, with discount of 1% to be allowed for cash within ten days from date of invoice, such discount to be upon the amount of the invoice less freight paid.

All quotations made to hold good for a period not to exceed fifteen days, deliverable within thirty days after acceptance. On jobs specifically named delivery is to be governed by the job or terms of the contract and the quotation is to so state, and is good for acceptance until the contract is let or until the quotation is withdrawn.

Freight charges to be paid by the purchaser, except to prepaid stations, or on re-shipments by water, or on government, state, municipal or railroad contracts requiring the prepayment of freight.

[Italicized part quoted in Fdgs. Par. Seven (i)]

All prices quoted for Portland Cement shall be the prices for delivery at the point required by the purchaser.

Bags:

Positively to be paid for with cement.

Discount in no case to be allowed on bags or freight.

Count and inspection at the mill always to govern.

Freight on returned bags to be prepaid by customer.

Trusting that these recommendations will be carefully considered by the members of the Association, and that the unfortunate and unwarranted misconceptions of each other's methods will be erased and confidence once more restored among the manufacturers and members of the Association.'']

[No action was taken according to the minutes, nor is any action recorded at the December annual meeting of that year.[24]]

[At the semi-annual meeting in June 1910, two years later, the President called upon various members to tell

[24] Com. Ex. 3235 Z36-39.

about business conditions in their respective sections of the country "as to the demand, as to the prices, and as to the future prospects."[25] Excerpts from the remarks follow:[26]

"Mr. Craney (Union Sand): • • • Trade is in a very, very happy condition out west, and has been so during the entire year, and the prospects are that it will be all the manufacturers can do out in the west to supply the demand, if they are able to do that. Prices west of the Mississippi River have been above the Atlas price, which has controlled the market for some time, since January, with the effect that the Atlas people have loaded themselves down with tonnage which they could not ship, at the lowest market price of the year. The other manufacturers out there had faith in a future market, held off, and are now reaping the benefit of it. • • •]

• • •

[Mr. Hagar (Universal): • • •

While I am on my feet I might speak of the condition of prices out here. The tremendous growth of new uses has produced in this part of the country a shortage of cement here now. Prices, of course, have advanced very rapidly and very steadily. In the middle of January the price basis around this section of the country was 70 cents at Lehigh, 80 at Hannibal, 55 at Mitchell. Take these one by one: Lehigh is today $1.25; that is 55 cents advance—eleven advances of five cents each. We have made eleven advances of five cents each on the Lehigh since the 15th of January. Mitchell is $1.10. That is about 55 cents—eleven advances there. Hannibal has been 80 cents for two years. Some of the manufacturers around here were up above that—85 and 90 cents. They continued to advance until they got to $1.10. Our prices advanced eight times to $1.20. They are five cents over Hannibal and have been for over a month. The Lehigh Valley prices which come from lake ports, covering Indiana and Michi-

[25] Com. Ex. 3235 Z53.

[26] Com. Ex. 3235 Z54-56, 59-63.

gan, have advanced from about a 50-cent basis. Illinois and Wisconsin are on an 80-cent basis. Michigan is on an 80-cent basis. Indiana was on an 85-cent basis and has recently advanced.

There are some people from the Lehigh Valley that cannot see yet that there are going to be good conditions everywhere out here. But I am willing to go on record that the surplus capacity of the Lehigh Valley this year will not be sufficient to supply the west with the surplus consumption above production it needs. One company in particular has been fighting this advance, fighting it in the middle west and fighting it in the east. The result has been that they have stayed below until they were forced up. They had to jump 20 cents a barrel the other day from the Valley for the reason that they have made so many contracts at the low prices. A party who contracted with them for 10,000 barrels and only took 2000 barrels from them last year, at this time has taken above the 10,000 barrels for this year. You take enough of those customers, and that particular mill is removed as a price factor. * * *]

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[Italicized part quoted in Fdgs. Par. Seven (k)]

["Mr. Duffield (Wabash): *The situation in Michigan is very satisfactory and growing more so. There was a chaotic state there early in the year. There was no unity of action at all among the mills until they formed a little association which comprises all the Michigan mills and one or two across the border. This has resulted in a free interchange of views and an understanding to the effect that the Lehigh prices should govern the prices out here. This understanding has been observed. The price today, based upon the Lehigh price of 80 cents, makes Detroit a price of $1.25 delivered.* * *]

* * *

[Mr. Lesley (American): * * *

So far as the Lehigh district is concerned, we are sitting on the box, and it looks as if the box was sitting on us. It looks as if there was a steady

price to consumers of $1.15, not in bulk but in bags, and a price to dealers of $1.10, not in bulk but in bags; and the charming figures of the west make our mouths water when we think of the grand profits. But there is this to be said in favor of the Lehigh district: While trade organizations can keep prices down, and I am perfectly sure they can, the fact remains that other conditions are helping prices a little. While we have been living in anticipation and fear of the Atlantic mill rising in our midst with 7000 barrels, a man with the Allentown Portland comes along this winter to overwhelm us with 3000 barrels a day; and Detroit comes up like Rip Van Winkle and dumps 1000 barrels into the New York market. It is sufficient to say that conditions in these United States have arisen in no alarming way, except in a shortened way, to give us any trouble. Northampton is closed, Whitehall is closed, Penn Allen has been closed and is just going on again, and it is very doubtful in the Lehigh Valley district whether we have not less output than we had last year.]

* * *

[Upon looking at the Lehigh district with an unprejudiced view, I believe that prices will advance, and I believe that they will advance in spite of anything we can do. I only wonder how long it will be that the methods we have of selling cement for less than nothing will prevail. But I do believe, in spite of all the errors that we make, the time will come when there will be two customers for every barrel of cement, and until then selfishness will prevail.

Mr. Hagar (Universal): I would like to make a little wager with Mr. Lesley that unless the Lehigh Valley advance their present prices they will be shipping west at higher than their home prices.

Mr. Lesley (American): I believe that for two reasons. In the first place, I do not believe in the price you make against your customers when the price is below the market price, and I do not believe in holding that price and then advancing on it when the market makes an advance. I believe it is a rule that ought to work both ways; if you have an

arbitrary rule, it ought to hold good in bad times as well as good times.]

• • •

[Mr. Kelly (Virginia): I have very little to say about it. Conditions with us have been that we have been the dumping-ground of the Lehigh Valley all down through the southern states, and the result has been that our prices have been rather low. There has been an improvement in the last thirty days beginning to take effect, and we have rather depended upon the action of the Lehigh Valley people before we could put up our prices very much. I am trying to, as much as I can, let them have the ground, but we have to take care of our customers. I am really selling cement today when I would rather not sell, just because I want to be fair to the man I am dealing with. But our stocks are quite low, and, as I look at it, we would be a great deal better off today if we did not sell another barrel of cement for thirty days—let it accumulate. The Lehigh Valley people, I believe, are still selling cement in the south. I think they are selling south at 65 cents bulk. That 65 cents I should say is an improvement of probably 15 cents.]

• • •

[Mr. Harding (Coplay): Well, I am about the only bear in the room. Don't fool yourselves about Lehigh Valley. We have the condition down in the Lehigh Valley of a very sick baby. He has typhoid fever and pneumonia and smallpox and a few little things like that; and you can't change that baby until two or three men down there agree to get a better baby. It was all brought about by price agreements. That is the only price agreement I have ever known out of which no money could be made. They cannot change the price unless they all agree, and one man can keep them from changing that price. Seventeen men can agree to change a price, but one man can say 'No.']

• • •

[Mr. Newberry (Sandusky): Mr. President, I do not know as I should talk about this; but just a

few words. I do not suppose there was ever a large industry developed in which certain members showed so much obstinacy as in the cement business. It is simply incomprehensible. Here is an industry which has been growing tremendously in demand, and I suppose our customers think we are all making money. They do not suppose that we are born fools to go and sell cement cheap when we might as well be getting good prices. There never was an industry where conditions were so favorable for harmonious co-operation as in the cement industry, because in dull times or in good times the demand has steadily increased. We have seen it constantly growing. With any kind of reasonable harmony, goodwill and exchange of views, the industry would have been a thoroughly prosperous one through the dull times. There seem to be a certain number of men who are absolutely unwilling to make money for themselves and their stockholders if their competitors are going to make a little bit, and who are perfectly willing to get along without profits if they can keep the other fellow from making any. * * *

* * * it is certainly perfectly incomprehensible to me that manufacturers in the Lehigh Valley should all winter and the early part of the spring have sold at 65 cents at the mill when they could just as well have 75. One man prominent in the Lehigh Valley industry pointed out some other manufacturers—at Newcastle, I might say—as selling at a lower price than he was making. He said he did not propose to see his price advance to a point that would allow those people to make a whole lot of money. That has been just the spirit, and it is an absolutely foolish spirit. * * * I am hoping that the time will some time come when all manufacturers of cement in the United States can meet together harmoniously and with goodwill, as is done in other successful industries. Without this no industry can possibly be as successful as it should. We should meet together and informally exchange views as to the situation and market conditions. If we had a committee from each of the different districts, six or eight or ten,

> who would meet every month and talk matters over with the spirit of harmony and goodwill and a recognition that there are other cement manufacturers, that he is not the only pebble in the tube mill, I think conditions would be materially bettered. We do not need any price agreements; what we do want is the goodwill and an informal exchange of views and information. (Applause.)"]

[In the December 1910 annual meeting there were further comments on trade conditions:[27] Craney of Union Sand said that in his area they "had a fair price, due to cooperation", but that he had been accused of charging "too high a price" and "severely criticized for it". He thought it was a great mistake "to allow the price to decline in the winter, to go to its present price, which is below any possible chance of profit" and that "the price is pretty low".][28]

[Lesley reported that in the Lehigh Valley they were "on the decline". "We have raised hot air and oratory, and so far have very little which shows prosperity ahead for us."][29]

[Bayle from Glens Falls said his section was akin to the Lehigh Valley and that "cement men have a liking for making all sorts of prices."][30]

[Duffield of Wabash reporting on Michigan said the situation there was:[31]

> "* * * slightly better than the preceding year. That has been largely owing to the fact that all the Michigan mills got together and resolved to bolster up each other and endeavor to get a slight margin above cost. Their efforts were impeded very materially because the dealers were out to buy cement at the cheapest price they could get, and the result

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[27] Com. Ex. 3235 Z65-81.

[28] Com. Ex. 3235 Z66.

[29] Id.

[30] Com. Ex. 3235 Z67.

[31] Id.

was that in the Detroit market, which was very active in the season's consumption, 33-1/3 per cent of the consumption of cement was cement imported from the east, which was offered for a less price than the western mills were willing to take for it. I think the consumption in Michigan was slightly in excess of the preceding year. As I say, the prices were slightly in excess; but so long as the eastern mills are shipping in there at a ridiculously low price, we will be hampered in keeping up our price."]

[Hanahan formerly with Standard (not the respondent Standard) speaking of conditions in the south reported that:[32]

"* * * as the summer advanced the market was more or less flooded with cement from the east and also cement from the west, which naturally drove down the prices. There has been quite a decline recently, however, which was brought about largely from local competition—competition among ourselves. There are four mills in our immediate neighborhood in the south which could easily get a living price out of the business if we were not so actively competing with each other, which has recently brought down the price quite a good deal. * * *"]

[Newberry of Sandusky said prices were "within five cents of the low prices of last year". He continued:[33]

"This year, of course, as we all know, began well, and during the early part of the summer everybody was getting a good price for his product, with constantly increasing prices. Under Mr. Hagar's able lead and with the kind hints and suggestions that he gave us from time to time as to what we ought to do and would be foolish not to do, we saw the price advance from the lowest price of last winter up to a price 15 or 20 per cent higher, and we all hoped that that condition would prevail; and

[32] Com. Ex. 3235 Z67.

[33] Com. Ex. 3235 Z68.

along about the latter part of October I did certainly feel pretty easy in my mind, because I thought we were going to go through the winter with the prices that then prevailed maintained until spring. But that has proved to be a delusive hope, and many manufacturers have made the mistake of attempting to increase sales during the time when there are no sales by making a low price. We could not get cement used at this time of year if we sold it for ten cents a barrel, and all that we sell now simply hurts our sales in the spring.

I am earnestly hoping that it will dawn upon some of the manufacturers who do not seem to realize it. We certainly do. But I must say that I feel that unless co-operation and a harmonious exchange of views has the effect of steadying prices during the season of dull demand, it does more harm than good."]

[The situation in Virginia was outlined by Mr. Kelley of the Virginia company:[84]

"* * * the situation in Virginia is not especially encouraging. Our competitors are out here in the Lehigh Valley, for the most part, and the Lehigh Valley makes the price in the south. The price that they make, of course, is the price that we have to sell for, and I do not think they sell a barrel more of cement by putting a low price on it than they would sell if they charged a reasonable price. Our product goes out with the market and we sell all of our cement. They fill up the gap, whatever there is, if there is one, and they take a very low price, at present as low as 90 cents, including package, in the Lehigh Valley, perhaps a little lower."]

[Referring then to his experience in the Canadian market Kelley added:

"There is no use in trying to keep the prices right in any other way than by cutting down the production. The only way that I can see we will ever arrive at a suitable price is by getting some

[84] Com. Ex. 3235 Z68-69.

method, either automatic or otherwise, to cut the production down to what the consumption is, to meet the requirements of the market."]

[Hager of Universal reported:[88]

"* * * at the Hannibal office today it is 15 cents higher than it was a year ago, and 15 cents higher than it was over previous years until they reduced it this last summer. The Lehigh basis today is 20 cents over last year at this time. The Illinois basis is 10 cents over last year at this time. The Mitchell basis is 30 cents over a year ago. Now, these are large differences. The prices probably would be higher than this if some manufacturers did not think it was too high.

It is impossible to have co-operation if a few companies are going to do all the co-operating and the other fellows take advantage of it. It is very discouraging at times when you expect at least a little support, a little assistance, and oftentimes by the very people that need it, and instead of that, at the first opportunity they try to pull the structure down; at least they take action which results in that.

* * * Now, there is no one who would rather see a uniform price the year round than I. But that would mean that some manufacturers would have to be perfect, which is going a little bit rapidly. We may be perfect some day, but we are not quite perfect yet. That is the difficulty for maintaining the high prices for the winter when you have not an agreement with a penalty and all that sort of thing —that the errors and transgressions of somebody produce a condition which makes a weak market in the spring. Now, a weak market when the grass is coming up is dead wrong."]

[In 1911, at the semi-annual meeting in June the question of prices was brought up in connection with a membership drive for the Association. W. S. Mallory read to the meeting the letter he had sent to non-members solicit-

[88] Com. Ex. 3235 Z70-71.

ing their membership and reciting the work and purposes of the Association. In part the letter read:[36]

> "Our Association does not deal with the matter of prices, but it has and will, through its publicity and educational work, materially increase the consumption, thereby steadying prices as the volume increases. The districts suffering from the greatest over-production will receive proportionately the greatest benefit from this work.
>
> That you may have some idea of the work our Association is doing, I beg herewith to hand you a report of the Publicity Committee, which is issued monthly, showing the character of the work that is being done, also a copy of the monthly statistical card, giving details of the stock of clinker, cement, production and shipments of the various districts, which information is very valuable as showing the 'rate of flow' toward better or poorer conditions.
>
> The Association also gets out various bulletins and books relating to the use of concrete, and has, and will, do very effective work on national questions, such as standardizing specifications, methods of testing, questions of tariff, and other legislative matters."]

[Commenting on the letter Mallory added:[37]

> " . . . My own experience has been that where I had the opportunity of having a personal talk with them it was comparatively easy to secure them as members in many cases. The fact is, as I was informed by them, they had no realization of the work this Association was doing, and while some of them had an idea of what we were doing, it was a very confused idea. For example, they connect the question of making prices with this Association—they think that is a part of our Association's work, and, of course, I assure them that that will not be done under any circumstances.]

. . . .

[36] Com. Ex. 3235 Z91-92.

[37] Com. Ex. 3235 Z92-93.

[The President: * * * I know there is a great deal of misapprehension as to our objects and purposes. I have heard people say that this Association must be a failure because it does not hold the price up. So many people have the erroneous idea that if we are good for anything, it must be for keeping the price up or raising prices. As a matter of fact, as has been explained, this is a matter with which we have nothing to do. This Association has not and cannot have any connection with prices, excepting that by informing the public on the question of cement we increase consumption, and in that way, through an increased consumption, raise the price. It is much easier to increase prices by increasing consumption, than it is to change existing conditions. That is the way and the only way this Association will help prices."]

[The next reference to the Committee on Trade Conditions is a letter report made to the 1912 spring meeting of the Association which stated in part:[38]

"Your Committee on Trade Conditions has, as we understand it, to deal with what might be best expressed perhaps by the term 'Trade Practices', and to consider and recommend to the members of our Association such trade practices and methods of conducting our business as seem best suited to conditions affecting our welfare and best interests, and that also of those to whom we sell our product.

It has not been possible for your Committee to meet prior to this meeting, or to deal with the subject before us in as full detail as we feel is possible.

It is, of course, understood that the matter of price is entirely eliminated and disassociated from consideration, and our purpose to discuss and consider properly other factors equally as important and necessary to the accomplishment of satisfactory net results. * * *"

There was no further referenee to prices in the report. In the discussion which followed the President said:

[38] Com. Ex. 3236 W-Y.

"President Hagar: Mr. Zahn, as a member of the Committee, asked to have additional practices, of which there seems to be some question, referred to that Committee for future work. I have often felt personally that the matter of trade ethics or practices was as important as the price. It is much easier to reform a poor price than it is a poor practice. You can change the price overnight, but if you have a poor practice established for years it takes years to overcome it. Poor trade ethics have a very important effect on price."]

No action is shown to have been taken.

[The Committee again reported to the December 1912 meeting. This report concluded as follows:[85]

"Every manufacturer concedes the justice and fairness to all concerned of the recognized best practices of today, but feels that while correct in theory they are not capable of strict application because his competitor does not insist on such operation. The competitor feels the same way about the other, with the result that each manufacturer goes on doing things of disadvantage to himself and others.

A very apparent condition has, therefore, been established in that cement is bought by the buyers on their terms instead of being sold by the manufacturers on term and conditions alike fair to the buyer and the seller. Surely it ought not to be difficult to secure concerted action on the part of the manufacturers in something of more vital importance than price, which is feasible, desirable and legal. Uniformity in the observance of proper trade practices and methods can only result in more satisfactory, stable and healthy conditions for the manufacturer, dealer and contractor alike. A satisfactory price is of value only when represented by shipments made at that price, and is nullified to that extent to which it is affected by poor trade ethics. Operate under proper trade practices and the price will automatically regulate itself."]

[85] Com. Ex. 3236 Z12.

[Before the meeting adjourned a motion was carried to prepare in pamphlet form and put the report into the hands of the members.[40] This pamphlet is not in evidence.]

[The Committee reported again at the May 1913 meeting.[41] No reference was made to prices. The report concluded as follows:[42]

> "Your Committee understands that the fundamental policy and belief of the Association is that every manufacturer shall conduct his business exactly as to him seems best in every particular, and that it is accordingly not within the province of your Committee to recommend any action by the Association."]

[There is no reference to sale at delivered prices in any of the subsequent minutes of meetings of the Association. The printed report of the Committee on Trade Conditions for 1915 is in evidence. There is no recommendation respecting the nature of prices but the report appears to assume general use of delivered prices.][43]

[The name of the A.A.P.C.M. was changed to the Portland Cement Association in 1916.][44]

[None of the executives of respondents attributed any significance to the existence of this association in their testimony as to the development of their pricing methods.][45]

b. The Portland Cement Association

As already noted, in 1916 the name of the A.A.P.C.M. was changed to the Portland Cement Association, herein-

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[40] Com. Ex. 3236 Z20.

[41] Com. Ex. 3236 Z22-26.

[42] Com. Ex. 3236 Z26.

[43] Com. Ex. 3193, Govt. Ex. 245 in *U. S.* v. *Cement Manufacturers Protective Association.*

[44] Kinney, Vice President, Portland Cem. Assn. (C) Tr. 48478-79. Com. Ex. 3194: Letter Kinney to the Knickerbocker P.C. Co., Dec. 1, 1919.

[45] See pp. 97-134, *supra.*

after called the P.C.A.[1] Its activities are described in Part IX, Sec. B, *infra*. Porter, President of North American and a director of the P.C.A., after relating the activities of the Portland Cement Association stated that "its principal activity is that of promoting the uses of cement through technical services and investigations made to and in behalf of users of cement."[2] His examination proceeded further as follows:

> "Q. To what extent, Mr. Porter, if at all, has the question of cement prices been discussed or brought up at Portland Cement Association meetings, or meetings of the board of directors of the Portland Cement Association at which you were present? A. I have never known it to be discussed at all at such meetings." (Tr. 33986)

Elcock, Vice President of Southern States, who had been employed by the A.A.P.C.M. and its successor the P.C.A. from 1914 through 1925 (except for the war period) as field inspector on promotion and as a district manager testified as follows:

> "The first instruction which I had when I went with the Portland Cement Association was that the mention of such a word as 'price' meant immediate discharge.
>
> It is as clean an organization as there is in the country." (Tr. 37470)

R. W. Moore, Vice President and Director of Dewey, testified that the dues paid by Dewey to the Portland Cement Association were well worth the money in the development of new business.[3]

Kinney, Vice President of the PCA testified that cement prices are "none of our business."[4]

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[1] Kinney, *supra*, Tr. 48478-79.
Com. Ex. 3194: Letter W. M. Kinney to Knickerbocker P.C. Co., Dec. 1, 1919.

[2] (R) Tr. 33985.

[3] (R) Tr. 46771.

[4] (C) Tr. 48512-13.

The only evidence of any activity of the PCA as to marketing of cement is a pamphlet on "Trade Practices in the Cement Industry" which it published in January, 1919.[5] This was stated to be:

> "A compilation of the essential features of reports of the Trade Practices Committe , September, 1915, May, 1916, September, 1917, and May, 1918, intended to eliminate unfair methods of competition and improper and illegal discrimination, and to maintain the quality of, and standardize the specifications for, Portland cement."

The introduction to the report stated:

> "In the opinion of the committees the practices which they recommend are based upon sound business principles. Their recommendations are offered as ideal for the industry, and ought to be followed so generally as to become customs of the business. It was believed that the practices recommended would tend to eliminate unfair methods of competition and improper discriminations in price, and would at the same time maintain the quality of the product and stimulate the interest of the dealer to extend the sale and use of cement for all suitable purposes, and generally prove advantageous to all concerned.
>
> What follows in this pamphlet makes very evident the evils of the past and the reasons supporting each recommendation of the committees. Doubtless every manufacturer will desire to avail himself of the suggestions. Of course, no member of the Association is in any way obligated by the reports, or because of the adoption of the reports by the Association, to follow the recommendations. It is not at all a matter of mutual agreement, but solely a question as to whether the recommendations appeal to each member of the Association severally as the best thing for him and all concerned."

[5] Com. Ex. 3192 (Govt. Ex. 243 in the case of *Cement Manufacturers Assn. v. U. S.*).

Recommended quotation forms provided for a price "f.o.b. station named" or "f.o.b. cars—" (blank) and one of the terms stated "In making delivered prices, we only guarantee cost at destination * * *."[6]

Coogan, Alpha's Vice President who had been a member of the committee which compiled the recommendations said that the recommendations of the committee were not followed and had no effect.[7]

A survey made in 1922, part of the evidence in *United States* v. *Cement Manufacturers Protective Association*, shows the extent to which the recommended practices were followed.[8]

c. The Cement Manufacturers Protective Association

This was an association, formed in 1916, of 19 cement producers located in the northeastern area of the United States in what is now known as Bureau of Mines Districts 1 and 2. It was this Association and its members who were defendants in *United States* v. *Cement Manufacturers Protective Association* decided by the United States Supreme Court in 1925 (268 U. S. 588).[1] The trade practice reports and pamphlets were Government exhibits in that case.[2] The Association was dissolved on January 1, 1922.

There is no evidence to indicate any bearing on the origin of delivered prices. The Supreme Court in the Cement Manufacturers Protective Association case found that "the custom in the cement trade of selling cement at a delivered price which includes the mill price, the price of bags and freight charges, was an established trade practice before the organization of the defendant association" (Com. Ex. 95 A; 268 U. S. 588, *supra*).

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[6] Com. Ex. 3192, pp. 924-31.

[7] (R) Tr. 23876, 23392-94, 23875-76.

[8] Resp. Ex. 3788, pp. 1508-648, 2690-93.

[1] Fdgs., Par. 5.

[2] Com. Exs. 3235, 3236, 3192, 3193.

B. The Use of Delivered Prices.

1. Extent of Use

[The Commission has found that (Par. 7(a)):

> "Substantially all sales of cement by the corporate respondents are made on the basis of a delivered price; that is, at a price determined by the location at which actual delivery of the cement is made to the purchaser."

This finding is accepted since the evidence shows that in large measure whether cement is quoted or sold at a delivered price or an f.o.b. mill price the ultimate cost at destination is the prime consideration of both buyer and seller. The concessions by the Commission and the evidence on this point are set out in Sec. 3, pp. 177-181, *infra*].

The answers of sixty of the corporate respondents, and the evidence as to fifty-seven shows that it is their individual "policy" or "practice" generally to sell at delivered prices.[1] There is evidence to like effect respecting

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[1] The names starred so stated in their answers to Paragraph 5 of the complaint. The names with daggers so stated in their further defense, Paragraph 3.

*Aetna: Cree, Sales Manager (C) Tr. 513-15 ("most of the time").
Calvin, President (R) Tr. 30018.

*Alpha: Coogan, Vice President (R) Tr. 23042 ("almost entirely"); Com. Exs. 970-15 Q, 969-1 D, 975-19 R, 975-4 B, Burns & Clark questionnaire answers (all prices quoted f.o.b. destination after trucking eliminated).

*Arkansas: Thompson, Sales Manager (R) Tr. 46484.

*Ash Grove: Sunderland, President (C) Tr. 13646.

*Bessemer: Warren, F. B., Vice President (R) Tr. 32126.

*Castalia: Com. Ex. 3121 E: Answer to F.T.C. Questionnaire.

*Colorado: Com. Exs. 3176 R, 3176 M: Answer to F.T.C. Questionnaire.

†Consolidated: Storey, Vice President (R) Tr. 47586-87 (policy).

*Coplay: Twamley, Vice President (C) Tr. 6752-53, 6756.

*Cumberland: Pearson, Secretary-Treasurer (R) Tr. 39850.

*Dewey: Capen, Vice President (C) Tr. 12666;
Moore, R. W., Vice President (R) Tr. 46778.
*Diamond: Com. Ex. 3139 C: Answer to F.T.C. Questionnaire.
*Edison: Sweeney, Vice President (R) Tr. 35636 ("generally");
Cloos, Vice President (C) Tr. 7556 ("exclusively").
*Federal: Bates, J. E., Sales Manager (R) Tr. 30523.
†Florida: Storey, Vice President (R) Tr. 47586-87 (policy).
*Georgia: Com. Ex. 3116 B: Answer to F.T.C. Questionnaire.
*Giant: Com. Ex. 969-10 Z: Burns & Clark Questionnaire answer (policy).
*Glens Falls: Titsworth, President (R) Tr. 47955 (policy).
*Green Bag (Pa.).
*Green Bag (W. Va.): Wood, General Manager (R) Tr. 29406.
*Hawkeye: Com. Ex. 2627: Letter 4/21/30, C. B. Condon, Hawkeye to F.T.C.
*Hercules: Com. Ex. 1321: Excerpts from pages 18, 19 of article "How Portland Cement is Distributed" issued by Hercules ("as a rule").
Resp. Ex. 1108: Id. ("as a rule").
*Hermitage: McGovern, Sales Manager (R) Tr. 36122.
Huron: Crapo, Vice President (C) Tr. 11269.
*Idaho.
*Keystone: Scott, H. M., President (R) Tr. 27445.
*Kosmos: Horner, President (R) Tr. 36812-13.
*Lawrence: Ackerman, Vice President (R) Tr. 31191 (only with few exceptions).
*Lehigh: Com. Ex. 3143 I: Answer to F.T.C. Questionnaire ("practice").
*Lone Star: Neylan, Asst. General Sales Manager (C) Tr. 6617 ("practically all").
Com. Ex. 1112: Lone Star Pamphlet on "Trade Ethics & Marketing Policies", p. 22.
*Marquette: Colburn, Vice President (R) Tr. 39034.
*Medusa: Dawson, Vice President (R) Tr. 40052, 40057 (usual).
*Missouri: Alexander, President (R) Tr. 37088 (always).
*Monarch: Brooke, Vice President (R) Tr. 42190 (general policy).
*Monolith-Midwest.
*National: Dannelly, Vice President (R) Tr. 39625 (policy).
*Nazareth: Robeson, Vice President (R) Tr. 28001 (policy).
*Nebraska: Hoenig, Sales Manager (R) Tr. 42005 (almost entirely).

two non-respondent cement companies.[2]

A pamphlet (Com. Ex. 1321) entitled "How Portland Cement is Distributed", issued by Hercules in or about 1925, states that "As a rule prices are quoted by manu-

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*North American: Porter, President (R) Tr. 34000 (almost entirely).
*Northwestern Portland: Hollister, President (C) Tr. 8588.
*Northwestern States: MacDonald, B. A., Vice President (R) Tr. 36648-49 (always).
*Oklahoma: Thompson, Sales Manager (R) Tr. 46484.
*Peerless: Russell, Vice President (R) Tr. 34515-16.
Penn-Dixie: Browder, Traffic Manager (R) Tr. 38141.
Wing, Vice President (C) Tr. 8098 (ordinarily).
*Petoskey: Lucas, Vice President (R) Tr. 38699 (usually).
*Pittsburgh: Letzkus, Sales Manager (R) Tr. 37693, 37700 (usual practice).
*Utah.
†Signal Mountain: Storey, Vice President (R) Tr. 47586-87 (policy); Com. Ex. 975-12 Z (policy).
*Southern States: Elcock, Vice President (R) Tr. 37501 (greater part of sales).
*Southwestern: Warren, G. E., Vice President (R) Tr. 28923 (Osborn mill exclusively).
Blair, W. R., Sales Manager (El Paso) (R) Tr. 38936-37.
*Standard: Com. Ex. 3169 D: Answer to F.T.C. Questionnaire.
*Superior: Davis, President (R) Tr. 29590.
†Trinity: Storey, Vice President (R) Tr. 47586-87 (policy).
*Three Forks: Com. Ex. 3176 FF: Answer to F.T.C. Questionnaire.
*Union: Com. Ex. 3176 LL: Answer to F.T.C. Questionnaire.
*Universal Atlas: Affleck, President (C) Tr. 13034.
*Volunteer: Lewis, Manager (R) Tr. 32997-33000 (no ironclad policy).
Parsons, Sales Manager (C) Tr. 5089.
*Vulcanite: Com. Ex. 3128 G: Answer to F.T.C. Questionnaire.
*Wabash: Com. Ex. 3148 C: Answer to F.T.C. Questionnaire.
*West Penn: McKee, Vice President (R) Tr. 27726.
*Whitehall: Elliott, Vice President (R) Tr. 28495.
*Wolverine: Nelson, J. L., Vice President (R) Tr. 35905, 35907.

[2] Louisville: Hill, Vice President (C) Tr. 13261.
South Dakota: Hartley, Sales Manager (C) Tr. 12771-72.

facturers to their dealers calling for delivery of cement in carload lots f.o.b. destination".

An unsigned typewritten memorandum (Com. Ex. 42 A), the authorship of which is unknown states that "for fundamental reasons, it has long been contrary to the general practice of the industry to bid mill prices". In other writings and statements of executives of individual petitioners there are references to "the universal practice of quoting delivered prices only" (*e.g.*, Com. Ex. 836-2 V) or that all cement is sold at delivered prices.[3]

2. F.O.B. Mill Prices

a. General

Commercial customers have seldom requested f.o.b. mill prices.[1] While, as already noted, most sales are made at delivered prices, representatives of several companies testified that their companies had no policy against f.o.b. mill selling:

Charles Lewis, Manager of Volunteer, asked by the Trial Examiner whether it was that company's "policy" to refrain from selling f.o.b. mill, answered that it "had no ironclad policy as to that, and had at times bid f.o.b. mill" (Tr. 33000).

Lucas, Vice President of Petoskey, testified that his company had "no policy against making sales f.o.b. mill" (Tr. 38749), that Petoskey had made some sales on an f.o.b. basis almost since inception of the mill and that at the company's Chicago silo they sold both f.o.b. mill and delivered (Tr. 38748).

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[3] Universal Atlas: Reiter, Vice President (C) Tr. 3028 (custom of the trade).

[1] See evidence set out in Sec. 3, pp. 177-181, *infra*. The exceptions, regarding truck delivery and sales to railroads are referred to in Sec. 2, b and c, pp. 172-174, *infra*.

W. R. Blair, Sales Manager of Southwestern in the area served by its El Paso, Texas, mill, testified that their cement was "sold at both delivered prices and f.o.b. mill prices" (Tr. 38936-37).

McGovern, Hermitage Sales Manager, testified that the company's sales were made largely at delivered prices with certain exceptions, but that there was no period when the company sold all of its cement at delivered prices (Tr. 36121-22).

Crapo, Vice President of Huron, called as a Commission witness, testified that "in no case when a person wanted a mill price did we ever refuse to give it to him" (Tr. 11269). Rooney, also a Vice President of Huron, testified that the Sales Department has no policy upon the question of whether Huron wants to give "delivered prices or plant prices" (Tr. 33677).

Pearson, Secretary and Treasurer of Cumberland, testified that the greater part of that company's sales were at delivered prices but that there was no period when all of the company's sales were at delivered prices (Tr. 39850).

Dawson, Vice President of Medusa, testified that the company sales were not "normally" f.o.b. mill (Tr. 40057).

J. E. Bates, Sales Manager of Federal, testified that his company made a few f.o.b. sales (Tr. 30523) and Sweeney, Vice President of Edison, testified that his company made f.o.b. mill sales at times (Tr. 35636). There was other evidence of the same character from other respondents.[2]

No general policy or practice of selling either f.o.b. destination or f.o.b. mill appears in the evidence as to the following respondents: Green Bag Pa., Idaho, Monolith-Midwest and Utah:

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[2] Kosmos: Horner, President (R) Tr. 36813, 36932-33, 36942-47.
National: Dannelly, Vice President (R) Tr. 39627-28, 39652.
Peerless: Russell, Vice President (R) Tr. 34232, 34236-37, 34239.
Southern States: Elcock, Vice President (R) Tr. 37501-02.

Thus, the only evidence serving as a cross-section of the practice of Green Bag Pa. is a series of the company's invoices subpoenaed by the Commission for the month of April, 1938 which show sales f.o.b. delivered and f.o.b. mill.[3]

The only evidence serving as a cross-section of the practice of Idaho consists of a series of invoices of the company subpoenaed by the Commission for the month of April, 1938 which shows 75% of the sales thereby represented made at f.o.b. mill prices.[4]

The only evidence as to pricing of Monolith-Midwest consists of invoices to dealers for the month of April, 1938 showing two f.o.b. mill prices among many delivered prices[5] and bids to agencies of the federal government preponderantly f.o.b. mill.[6]

There is no evidence as to Utah's prices or price policies except the company's answer to the Federal Trade Commission questionnaire in 1932 which stated that the company had "no standard method" of pricing and that "bids are governed by competitive territory in which cement is delivered and transportation rates".[7]

b. F.O.B. Mill Sales to Railroads

Sales to railroads have customarily been made f.o.b. mill where the railroad has a line at the mill and f.o.b. near-

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[3] Com. Ex. 2631.

[4] Com. Ex. 2695.

[5] Com. Ex. 2722(3), (56).

[6] Com. Exs. 127 A-B, 1328-1331, 1339, 1341; Resp. Exs. 384 A-B, 3692; Peoples, U. S. Director of Procurement (C) Tr. 10010-15, 10025, 10263-64, 10266-67, 10269-70, 10271-72.

[7] Com. Ex. 3137 C.

est junction point otherwise.[1] Penn-Dixie's Traffic Manager, D. S. Browder, explained this as follows:

> "When the Penn Dixie mill is located on a customer railroad's tracks, Penn Dixie quotes the railroad f.o.b. their tracks the lowest price base obtaining at any mill on their tracks. When Penn Dixie's mill is not located on the railroad calling for a quotation, Penn Dixie quotes the railroad f.o.b. the nearest point on their line to its mill, the lowest price base at any mill located on the railroad line. When no mill is located on the line of the railroad requesting a quotation, Penn Dixie quotes the railroad f.o.b. the nearest point on the line to the Penn Dixie mill the lowest delivered price at any point along the line.
>
> Of Penn Dixie's so-called base mills, the Richard City mill is on the N. C. & St. L. Railroad, the Kingsport mill is on the Clinchfield Railroad and the Clinchfield mill is on the G. S. & F. Railroad. The price bases at these mills are the lowest price bases obtaining at any mill along the tracks of those railroads. Penn Dixie, therefore, quotes those railroads the Richard City, Kingsport and Clinchfield bases, respectively, f.o.b. their tracks Richard City, Kingsport and Clinchfield." (Tr. 38147-48)

John Bowen, Vice President of Lehigh stated the reason for quoting railroads in this manner as follows:

> "That, again, is where the competition lies. Railroad companies haul material over their own

[1] Neylan, Asst. General Sales Manager, Lone Star (C) Tr. 6617.
Robeson, Vice President, Nazareth (R) Tr. 28003, 28371.
Moore, R. W., Vice President, Dewey (R) Tr. 46985.
Pearson, Secretary-Treasurer, Cumberland (R) Tr. 39909.
Koch, Vice President, Lone Star (R) Tr. 32663.
Browder, Traffic Manager, Penn-Dixie (R) Tr. 38141.
Bates, J. E., Sales Manager, Federal (R) Tr. 30524.
Blair, W. R., Sales Manager (El Paso), Southwestern (R) Tr. 38940-41.
Stone, Vice President, Universal Atlas (R) Tr. 35276.

lines from the place to which we deliver it. We prepare their prices on that basis. Unless our price at the point to which we make delivery to the railroad is at least as low as the price quoted by our competitor, we can't hope to get the business." (Tr. 26610-11)

c. F.O.B. Mill Sales to Trucks

Many respondents gave as an exception to their general use of delivered prices, f.o.b. mill sales to trucks and other types of f.o.b. truck prices. This evidence is digested in Part VI, B, E, *infra*, in connection with the general topic of truck delivery.

d. F.O.B. Mill Sales to Government Agencies

The evidence shows that government agencies, federal and state usually request destination prices and not f.o.b. mill prices.[1] The exceptions to this, and the extent to

[1] Testimony that the Federal Government usually asks for destination prices:
Browder, Traffic Manager, Penn-Dixie (R) Tr. 38433-34.
Calvin, President, Aetna (R) Tr. 30100.
Custer, Senior administration assistant, Bureau of Supplies & Accounts, Navy Dept. (C) Tr. 21280-85.
Dawson, Vice President, Medusa (R) Tr. 40058-59; cf. 40370-72.
Elcock, Vice President, Southern States (R) Tr. 37568-70.
Elliott, Vice President, Whitehall (R) Tr. 28635-36.
Hoenig, Sales Manager, Nebraska (R) Tr. 42053.
Horner, President, Kosmos (R) Tr. 36813.
Koch, Vice President, Lone Star (R) Tr. 32672.
Letzkus, Sales Manager, Pittsburgh (R) Tr. 37701.
Lucas, Vice President, Petoskey (R) Tr. 38749, 38802-04.
McKee, Vice President, West Penn (R) Tr. 27941-42.
MacDonald, B. A., Vice President, Northwestern States (R) Tr. 36548-49.
Nelson, J. L., Vice President, Wolverine (R) Tr. 35908, 36068-70.
Rice, Attorney, U. S. War Dept. (C) Tr. 1574-77.
Russell, Vice President, Peerless (R) Tr. 34429.

Scott, H. M., President, Keystone (R) Tr. 27578, 27618-19.
Sweeney, Vice President, Edison (R) Tr. 35640, 35795.
Thompson, Sales Manager, Oklahoma & Arkansas (R) Tr. 46527-29.
Titsworth, President, Glens Falls (R) Tr. 47902-10.
Warren, F. B., Vice President, Bessemer (R) Tr. 32126-43, 32418-20.
Warren, G. E., Vice President, Southwestern (R) Tr. 28956.

Testimony that state purchasing agents with minor exceptions invite bids solely f.o.b. destination:

Astell, Senior Assistant Engineer, Wisconsin Highway Comm. (C) Tr. 12158-59; Com. Exs. 1916-1918: Advertisements of Wisconsin Highway Comm. for bids on cement.
Betts, Purchasing Agent, N. C. State H'way Dept. (C) Tr. 20221-23, 20233-34.
Blom, Assistant Administration Engineer, Iowa State H'way Comm. (C) Tr. 11676-77.
Bowen, Vice President, Lehigh (R) Tr. 27066.
Colegrove, Secretary, Pa. Dept. of Prop. and Sup. (C) Tr. 418.
Dawson, Vice President, Medusa (R) Tr. 40059.
Foley, Auditor-Purchasing Dept., Indiana State H'way Comm. (C) Tr. 11799-801.
Hamlin, Office Engineer, Illinois Div. of H'ways (C) Tr. 11904-05.
Henderlite, Chief Engineer, Louisiana H'way Comm. (C) Tr. 13816.
Koch, Vice President, Lone Star (R) Tr. 32796-97, 32800; Resp. Exs. 2353-2355.
Lemmon, Purchasing Agent, Va. Dept. of H'ways (C) Tr. 345-46.
Letzkus, Sales Manager, Pittsburgh (R) Tr. 37701.
McGovern, Sales Manager, Hermitage (R) Tr. 36283.
McKee, Vice President, West Penn (R) Tr. 27919.
Manley, General Manager, Hawkeye (R) Tr. 41710-11.
Nelson, J. L., Vice President, Wolverine (R) Tr. 35908.
Reagel, Engineer, Missouri State H'way Dept. (C) Tr. 13760-61, 13768-74, 13782; Resp. Exs. 2437-2442.
Russell, Vice President, Peerless (R) Tr. 34429-30.
Titsworth, President, Glens Falls (R) Tr. 47902-05, 47959; Resp. Ex. 3717; Resp. Exs. 3718, 3719 for id.
Warren, F. B., Vice President, Bessemer (R) Tr. 32418-20.
Warren, G. E., Vice President, Southwestern (R) Tr. 28929-31, O.P. 28948.

which respondents sold at f.o.b. mill prices to public agencies when such requests were received is collected under the topic Sealed Bids To Government Agencies, Part IV, *infra*.

3. Reasons for Use of Delivered Prices

a. The Influence of High Transportation Cost of Cement

Cement being a heavy, bulky commodity, the freight charges constitute a substantial percentage of its cost to the buyer, amounting in many cases to from thirty to sixty cents per barrel and sometimes more and averaging from twenty to twenty-six percent of the price paid by the buyer.[1]

Cement plants are varying distances from markets, each often served by many different railroads.[2] The layman is unfamiliar with rates from all possible sources to his station. Freight tariff schedules, to him, are complicated and he has neither the time, the inclination nor the facilities to determine the rates.[3]

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[1] Fdgs., Par. Three (a).
Coogan, Vice President, Alpha (R) Tr. 25033-34.
Resp. Ex. 1108, pp. 7-8: Extract from "How Portland Cement is Distributed" by Morris Kind.
Resp. Ex. 2341: Bessemer tabulation showing average freight per barrel.
See concession by Commission Counsel, Tr. 36732.

[2] Resp. Ex. 1108, pp. 13, 15.

[3] Horner, President, Kosmos (R) Tr. 36887.
Brooke, Vice President, Monarch (R) Tr. 42190.
Blair, W. R., Sales Manager, Southwestern (El Paso) (R) Tr. 38937-38.
McCracken, Dealer (R) Tr. 36713-14, 36766.
McGovern, Sales Manager, Hermitage (R) Tr. 36411.
The Trial Examiner excluded further proof on the subject on the ground that "it has been covered" and that it consists of "unnecessary particulars and details" to prove it further. (Tr. 36887)

Local railroad agents usually have on hand only a few tariffs which cover shipments originating from that station. They do not keep tariffs covering shipments to that station from all shipping points. In most instances the local station agent would not have tariffs covering the originating railroad for cement shipments.[4]

b. The Attitude of the Cement Buyer

The evidence is uncontradicted and undisputed that all cement purchasers always buy cement on the basis of the laid down cost to them at destination or place of use of the cement and that they ordinarily request and prefer delivered prices.[1] The Trial Examiner rejected further evi-

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[4] Cole, Traffic Manager (Medusa) (R) Tr. 40792-93, 41420, 41426.
Blair, W. R., Sales Manager (El Paso) Southwestern (R) Tr. 38937-38.
Meyers, Traffic Manager (Huron) (R) Tr. 33354-55.
R. Exs. 3217-3218, 2385.

[1] *Testimony of purchasers*:

Ashley, Dept. of Agriculture (C) Tr. 5452, 5458.
Betts, N. C. Hwy. Dept. (C) Tr. 20233-34.
Blom, Iowa State Highway Comm. (C) Tr. 11677, 11692-94.
Custer, Bur. Sup. & Accts., Navy Dept. (C) Tr. 21306-07.
Foley, Indiana State Hwy. Comm. (C) Tr. 11800-01.
Harkness, Pros. Div., Treas. Dept. (C) Tr. 4931-32, 4933.
McCracken, Dealer (R) Tr. 36713, 36715, 36721-22, 36766.
Peoples, U. S. Director of Procurement (C) Tr. 10310, 10311, 10347.
See Com. Ex. 125 A-B: Letter and Abstract of bids to Bur. of Reclamation, Feb. 1937.

Testimony of producers:

Sweeney, Vice President, Edison (R) Tr. 35639-40.
Horner, President, Kosmos (R) Tr. 36812-13.
Browder, Traffic Manager, Penn-Dixie (R) Tr. 38601, 38141-42.
Robeson, Vice President, Nazareth (R) Tr. 28048, 28052.
Calvin, President, Aetna (R) Tr. 30112.
Pearson, Secretary, Cumberland (R) Tr. 39850-51.

dence on the subject and the fact was conceded by Commission Counsel.[2] Thus the following occurred at Tr. 36734 *et seq.*

"Mr. Wooden: That in May, 1938, I took the position in New York City that I am taking now,

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Koch, Vice President, Lone Star (R) Tr. 32655, 32660, 32662, 32672.
Russell, President, Peerless (R) Tr. 34472, 34516.
Bates, J. E., Sales Manager, Federal (R) Tr. 30532, 30534-36.
McGovern, Sales Manager, Hermitage (R) Tr. 36122, 36283.
McKee, President, West Penn (R) Tr. 27726, 27867, 27919-20.
Letzkus, Sales Manager, Pittsburgh (R) Tr. 37700-01.
Warren, G. E., Vice President, Southwestern (R) Tr. 28922-23, 28951, 28927-30, O.P. 28948, 29065-66.
Blair, W. R., Sales Manager (El Paso) Southwestern (R) Tr. 38937, 39407.
Davis, President, Superior (R) Tr. 29596.
Coogan, Vice President, Alpha (R) Tr. 24456-57.
Fellows, Sales Manager, Alpha (R) Tr. 25492-93.
Scott, H. M., President, Keystone (R) Tr. 27562-63.
Harte, Vice President, North American (C) Tr. 8247-48.
Neylan, Asst. General Sales Manager, Lone Star (C) Tr. 6178.
Hogan, President, Lone Star (R) Tr. 34575.
Moore, R. W., Vice President, Dewey (R) Tr. 46779, 46792-93.
Warren, F. B., Vice President, Bessemer (R) Tr. 32169.
Lucas, Vice President, Petoskey (R) Tr. 38701, 38748.
Manley, General Manager, Hawkeye (R) Tr. 41710, 41861.
Dawson, Vice President, Medusa (R) Tr. 40595, 40057.
Brooke, Vice President, Monarch (R) Tr. 42190.
Apt, Traffic Manager (Osborn), Southwestern (R) Tr. 39447.
Alexander, President, Missouri (R) O.P. Tr. 37171-72.
Elcock, Vice President, Southern States (R) Tr. 37501-02.
Nelson, J. L., Vice President, Wolverine (R) Tr. 35877-78, 35907.
Thompson, Sales Manager, Oklahoma & Arkansas (R) Tr. 46536.
Affleck, President, Universal Atlas (C) Tr. 13034-35.
Crapo, Vice President, Huron (C) Tr. 11267.
Resp. Ex. 1415 F, H.
Com. Ex. 1112, p. 22: Lone Star Pamphlet on "Trade Ethics & Marketing Policies."

[2] Tr. 28049, 32140, 32672-73.

that any buyer is interested in knowing what the commodity was going to cost him laid down at the place he wanted to use it, and to prove that it does not need any proof, I will concede it, but that is a different thing from saying that the buyers want the basing-point system of identically delivered prices.

Mr. Brick: That is not the point. I am asking whether or not the Government Counsel will concede that the purchasers of cement and other heavy products of a similar character, where freight is an important factor in cost, request of the sellers delivered prices laid down at the purchasers' yard or place of use.

Now, as I see it, the answer to that is either 'yes' or 'no.' If it be 'no,' why, then, we have to establish it by proof. It it be 'yes,' we do not have to establish anything.

Mr. Wooden: I would be willing to concede that some dealers, some purchasers, would so testify.

Trial Examiner Norwood: A substantial number of purchasers?

Mr. Wooden: Yes, a substantial number.

Trial Examiner Norwood: Would so testify?

Mr. Brick: And will Government Counsel accept such testimony as representative of the fact?

After all, why let us beg the question. It is a matter of saving time.

Mr. Wooden: I have told you just as plainly as I can tell anybody just what my position is, that any buyer wants to know, and he is interested in knowing, what the cost is at the place he wants to use it." (Tr. 36734-35)

Again, in connection with the offer of Resp. Exs. 2704-2706 the following colloquy occurred:

"Mr. Paulson: • • • They are introducing this to show, Mr. Werle says, that the Government buys on the basis of destination cost.

Trial Examiner Norwood: Yes.

Mr. Paulson: There is no dispute about that at all • • • There is nothing in issue about that." (Tr. 36299)

At another point:

> "Trial Examiner Norwood: You have shown numerous times * * * that in all cases the Government awarded the contract on the destination cost." (Tr. 32134)

And still again the Trial Examiner stated that "we shall waste no further time on exhibits of this nature which are offered to show the customers asked for destination prices" (Tr. 32140).

Koch of Lone Star was examined on this subject in connection with his experience in 1905. The record shows the following:

> "Q. Well, in a general way, Mr. Koch, how did the Government request its bids? A. My recollection is that they generally requested destination price. In a few instances they might have asked you for a mill price.
>
> Q. And on what basis did the Government make its awards with regard to those various methods of bids? A. So far as I have been able to observe, in my experience, with a few possible exceptions in the early days, they awarded them on the cost to the Government at the point of use.
>
> Mr. Wooden: Your Honor, here is another point where we have had testimony over and over again on that point, and I think I have frequently offered to admit that the Government, like any other purchaser that wants to use cement at a given place, will naturally figure the cost of it from various sources, at the place it wants to use it, in order to determine which is the most advantageous purchase,—no dispute about it. (Tr. 32672-73)
>
> * * *
>
> Mr. Wooden: This admission applies to all periods of time. It is an all-inclusive proposition that any purchaser is going to find out what it is going to cost him laid down at the place. We do not need any proof on it." (Tr. 32674)

[The evidence as to invitations for f.o.b. mill bids by some agencies of the federal government and requests of others to buy delivered on trucks at the mill is digested elsewhere.][3]

c. The Attitude of the Producer

Cement manufacturers testified that this disposition of all buyers to compare laid down cost of various brands at destination and the resulting request of most buyers for delivered prices was the reason why they sell largely at delivered prices.[1] As already noted Alpha's Vice President, Coogan, said this was "perhaps one of the most important factors" in the origin of delivered prices.[2]

J. F. Neylan, Assistant General Sales Manager of Lone Star, testified that an f.o.b. mill price "doesn't mean any-

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[3] Agencies of federal government: See Part IV, *infra*.
Truck mill prices: See Part VI, E, F and G, *infra*.

[1] Alpha: Coogan, Vice President (R) Tr. 23096-97, 24330.
Bessemer: Warren, F. B., Vice President (R) Tr. 32148-49.
Dewey: Moore, R. W., Vice President (R) Tr. 46778-79.
Federal: Bates, J. E., Sales Manager (R) Tr. 30524.
Hawkeye: Manley, General Manager (R) Tr. 41709-10.
Hercules: Brobston, President (R) Tr. 26142.
Keystone: Scott, H. M., President (R) Tr. 27616.
Kosmos: Horner, President (R) Tr. 36812-13.
Lehigh: Bowen, Vice President (R) Tr. 26610.
Lone Star: Koch, Vice President (R) Tr. 32663.
Medusa: Dawson, Vice President (R) Tr. 40057-59.
Missouri: Alexander, President (R) Tr. 37167.
Nazareth: Robeson, Vice President (R) Tr. 28457.
Penn-Dixie: Browder, Traffic Manager (R) Tr. 38141-42.
Petoskey: Lucas, Vice President (R) Tr. 38748-49.
Pittsburgh: Letzkus, Sales Manager (R) Tr. 37700.
Southern States: Elcock, Vice President (R) Tr. 37501-02.
Southwestern: Warren, G. E., Vice President (R) Tr. 28923.
West Penn: McKee, Vice President (R) Tr. 28001-02.
Wolverine: Nelson, J. L., Vice President (R) Tr. 35907-08.

[2] (R). Tr. 23096-97, see p. 118, *supra*.

thing" during the course of his examination as to statements made in Lone Star's pamphlet entitled "Trade Ethics And Marketing Policies" in evidence as Com. Ex. 1112. It was there stated that if the company's mill base price is unreasonable it invites the invasion of its nearby territory by competing mills. Mr. Neylan was examined as follows:

"Q. If you sold on an f.o.b. mill basis instead of delivered, that would still be true, wouldn't it, that if your price would be unreasonable, it would be an invitation for an invasion from competing mills? A. Well, it depends upon what the 'unreasonable' is. That is not explained here. 'Unreasonably high' is in here.

Q. Yes, unreasonably high. A. Naturally it would follow that if a price is unreasonably high other mills would possibly find that market attractive.

Q. Even though that unreasonably high price were f.o.b. mill price? A. What do you mean by f.o.b. mill price?

Q. A price made to turn over to the purchaser at the mill and for him to provide his own transportation in any way he likes. A. That would depend upon the cost of the man to get his cement from the mill.

Q. I am talking about the price you would make to him at the mill. A. The other man's price is not made at the mill. It has to be some point where the two come together.

Q. Won't you even concede that an f.o.b. mill price is conceivable, that there is possible such a thing? A. There is an f.o.b. mill price, but it doesn't mean anything.

Q. In the case of your mill base prices so far as they are effective, you said that all you get out of it is the mill base price? A. That is true.

Q. Then I asked you why, if that were true, you did not sell it f.o.b. mill at that mill base price? A. But you are talking here about a purchaser buying cement. He is not buying cement and using it at the mill where he is getting the f.o.b. mill price.

Q. Not the way you sell it. A. Under any conditions he would not.

Q. If you did sell f.o.b. mill, if your f.o.b. mill price became unreasonably high, that would be an invitation for outside mills to come in? A. It would depend upon the competition of the competing mill and the point at which the cement was going to be used. That man would figure a price at the point of ultimate consumption; and if you figure his price unreasonably high at that point, that would invite competition.

Q. Regardless if it was sold f.o.b. mill or not? A. But the comparison would be at the point where the cement was going to be used.

Q. Nevertheless, if the f.o.b. mill price were too high outside mill prices would be invited to come in? A. F.O.B. price does not mean anything, not to the purchaser. What he is interested in is what it is going to cost him at the point he is going to use it, and that is where he is going to compare prices."[3]

The booklet prepared by Morris Kind, former President of Hercules, and issued by the company in 1924 (Resp. Ex. 1108) after stating the attitude of cement buyers sums the matter up as follows:

"In other words, the large number of manufacturing plants and producing centers, their varying distances from different markets, the complexity of freight tariff schedules, the layman's lack of familiarity with rates from all possible sources to his siding and the difficulties he would encounter in trying to figure out his cost if he bought F.O.B. any mill, all combine to make F.O.B. delivered prices a necessary method of distributing cement from the buyers' standpoint.

The result has been unavoidable that under conditions commonly and generally prevailing cement is sold F.O.B. point of delivery. (p. 14)

• • •

[3] (C) Tr. 6177-79.

> This method of marketing cement is followed on the one hand because of an actual need for knowing the delivered cost on the part of those who buy the product, and on the other hand because in many cases it is necessary for the manufacturer to quote F.O.B. prices in order to meet competition." (p. 15)

In a memorandum to members of its organization, Penn-Dixie, in December, 1928, explained its use of delivered prices as follows:

> "A purchaser of cement wants to know the cost to him of cement at the place where he proposes to sell or use it. It is a matter of considerable inconvenience and difficulty for a buyer of cement to ascertain the freight rates from all the mills serving a market to the place where he wants the cement. Therefore, in asking for price, the buyer habitually asks for price delivered at point of use. So general is this that it has become our custom to quote delivered price not because this is of any advantage to us but because it is desired by the customer." (Com. Ex. 2850 A)

Typical excerpts from the testimony of cement executives referred to in footnote 1, *supra*, as to why they sell largely at delivered prices including the type of cross examination on the point by Commission counsel, follow:

Lehigh: "Because we find the competition at destination and because our customers buy on the cost of the material at destination. Our quotations face the reality of that situation, * * *." (Bowen, *supra*, Tr. 26610)

Hercules: "because that is where the market is." (Brobston, *supra*, Tr. 26142)

Southern States: "That is how the customer wants it * * *. That is where the market is. That is where he wants his price." (Elcock, *supra*, Tr. 37501-02)

Nazareth: "because that is the point at which we have our competition, the point of use. • • • There is no market at our mill." (Robeson, Vice President (R) Tr. 28001-02)

Keystone: "• • • the competitive impact that we have experienced is at destination, that is where we meet competition." (Scott, *supra*, Tr. 27616)[4]

Federal: "because that is where we find competition is, at the destination • • •." (Bates, *supra*, Tr. 30524)

Petoskey: "• • • quotes delivered prices to enable it to compete with other manufacturers and to enable its dealers and contractor customers to compare its quoted prices with the prices or delivered costs quoted by its competitors." (Lucas, *supra*, Tr. 38748)

F.T.C. Investigator Royal testified that C. B. Condon, General Manager of Hawkeye, told him they had not bid f.o.b. mill on an Illinois State Highway alternative request because "it would have disrupted the entire price structure, and that he did not want to run any risk of doing that".[5] In an interview with Cabanis of Northwestern States, regarding this same invitation, Royal testified that:

> "Mr. Cabanis stated that the practice of bidding on a destination basis was of long standing and both he and Mr. MacDonald said that if a deviation was made from that practice it would disrupt the price situation."

Royal also reported that F. L. Stone, Vice President of Universal Atlas, told him:

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[4] See Mr. Scott's testimony before the Senate Interstate Commerce Committee in hearings on the Wheeler Anti-Basing Point Bill, Resp. Ex. 1415, pp. 641, 643.

[5] (C) Tr. 12812.

"We discussed the matter further and he said that quoting prices on an F.O.B. mill basis would set up a zone around each mill, the extent of the zone being determined by the area within which the mill had a freight advantage, and that this would effectually shut off bidding in the territory by any other mill, but he said that a mill would find it absolutely necessary to reach out further for business than the zone within which the F.O.B. mill basis would confine them. He said that a crop failure or some other catastrophe would really force them to reach out further. And he said that in—when they reached out further with the idea of absorbing some of the freight charges, they would get into the territory of another mill which had the natural advantage in that zone, and the result would be that that mill would reduce its net mill price in order to compete, and the situation would resolve itself into an F.O.B. destination proposition again.

Q. * * * Did you ask Mr. Stone any questions as to whether quoting on an F.O.B. destination basis was or was not essential in any program of uniform destination prices?

* * * I asked Mr. Stone whether in a program of uniform mill prices among all the cement companies the policy of quoting prices F.O.B. destination was essential. He replied that there might be other ways in which this could be maintained but he didn't know of any." (Tr. 12337-39)

Typical cross examination of respondents' executives by Commission counsel follows:

Robeson, Vice President, Nazareth:

"We feel our competition is at destination. We want to keep ourselves where we can be competitive at destination (Tr. 28455). * * * That is the reason that we have the policy where we leave ourselves flexible to meet competition where we find it.

Q. You would sooner meet competition at destination points than to make competition by having an f.o.b. mill price? A. From our standpoint, the Naza-

reth Cement Company, yes, we want to be free to meet competition at destination.

Q. What advantage is there to you in being able to meet competition at destination, over making the competition at your mill? A. Well, in the congested area of the Lehigh Valley, as there is no market at our mill, our market is away from our mill.

Q. The only advantage is that the present method has a stability, in that it leaves the destination prices stable, isn't it? A. No, I wouldn't say that that's the answer to it. We are now in a position where we can meet competition as we find it. If we are to have a rigid or a non-flexible price at our mill, why, then, we would be confined to an area where we couldn't live." (Tr. 28457)

Cowgan, Vice President, Alpha:

"Q. I understood you to say that you did not make a practice of quoting f.o.b. mill because it would prevent you from meeting competition at the destination. A. Yes, that is correct.

Q. And by the same token, I gather that you quote delivered because it enables you to meet competition at destination; is that right? A. That is the point where we meet the competitive impact." (Tr. 24330)

Manley, General Manager, Hawkeye:

"Q. Which system of selling do you prefer, f.o.b. mill or f.o.b. destination? A. f.o.b. destination.

Q. Have you in any of your experience with the Hawkeye Company ever received a request for prices f.o.b. mill? A. Yes.

Q. Is one of the reasons that you prefer f.o.b. destination selling the fact that customers ask or desire to know what the delivered cost would be or is? A. Yes.

Q. Well, if you had an f.o.b. mill price, would it be difficult for you to advise your customers what the delivered cost at their location would be by rail? A. No, it would not be difficult. (Tr. 41861)

• • •

Q. So from that standpoint, that is, the standpoint of favoring customers with that service, telling them what the destination cost would be, f.o.b. destination selling is not at all necessary; is that true? A. That is what they ask for.

Q. Yes, but you could give them the destination cost even though you were selling f.o.b. mill without great trouble? A. When a contractor is doing a job he writes in and asks for the price at destination. (Tr. 41862)

• • •

Q. What other reasons do you have in mind for selling at f.o.b. destination prices?

• • •

A. In our general solicitation of business we find the competition is really at the point of consumption, and that is really what we are after.

Q. Well, is it necessary for you to know what your competitors are quoting in order for you to arrive at a price for your cement? Is that what I am to understand? A. We find that we cannot sell any business at any higher price than they are quoting." (Tr. 41863)

Elliott, Vice President of Whitehall said the use of a varying f.o.b. mill price would have the same effect as a delivered price. On cross examination his testimony was as follows:

"Q. You told Mr. Leisure that up until 1922 your company sold on the basis of a mill price plus sacks plus freight. A. Yes, sir.

Q. Did you experience any difficulty during—that is, up until that time, and during the time of that method of sale, in meeting competition—that is, the impact of competition, wherever you found it? A. No, sir; because, really, we met the competition at the destination, because we—if we lost in freight, we lowered our base; the result was the same, except we did it from the other end.

Q. It wasn't a matter of your figuring on a destination price basis, in the meeting of any competi-

tion, then? A. It really was, because the prices which we found in the field were such and such a price, and then we had to make up our mind whether we wanted to take less at the mill in order to meet that price, with our freight rate.

Trial Examiner Norwood: But you really could sell f.o.b. mill at varying mill prices, that would have the effect of meeting any delivered price, couldn't you?

The Witness: Yes, you could do that; yes, sir; we did for years." (Tr. 28675-76)

Koch, Vice President, Lone Star:

"Q. You testified that the principal advantage of delivered prices was to enable you to meet competition at destination; is that correct? A. Correct; that's one of them.

Q. And you defined, I believe, for us on Wednesday—last Wednesday afternoon—what your conception of meeting competition was.

Would you say that you cannot meet competition at destination and sell f.o.b. mill? A. Not if you have a rigid f.o.b. mill price.

Q. In other words, the difference in freight rates would create substantial variations in delivered prices; is that it?

• • • •

A. That all depends upon——

Trial Examiner Norwood: That is, in case there were an inflexible mill——

Mr. Wooden: Yes.

Trial Examiner Norwood: —or f.o.b. mill or base price?

Mr. Wooden: Yes, it is based on his previous answer.

Trial Examiner Norwood: Yes.

A. That is, all base prices would be the same?

By Mr. Wooden:

Q. No; whether they were the same, or even though the base prices were the same, the delivered

costs would be different owing to different freight rates, would they not? A. If you are starting with the same base at various points of production, there would be destinations in which there would be a variety of costs.

Q. Yes. And if the base prices were different there would be still more variations, wouldn't there? A. There might be." (Tr. 33217-20)

Respondents expressed a further factor which has influenced their pricing, namely the alternatives which are available. This evidence is referred to in detail and digested in Part XX, *infra*. Below are merely set out brief but typical excerpts from the evidence on this aspect.

H. Struckman former President of Lone Star wrote Governor Horner of Illinois under date of April 28, 1933 explaining the failure of the company's Indiana mill to quote f.o.b. mill on state highway requirements of Illinois. Struckman said:

"Throughout the development of the cement industry the theory of f.o.b. mill prices has been tried many times, but has always proved impractical in application. The reason is not difficult to understand. Cement manufactured under a highly scientific process is selling at the mills in Illinois for less than one-third of one cent per pound. Therefore transportation charges are a very considerable part of its cost at destination. In every market, where two or more cement companies are in a position to compete, the lowest freight rate from any of the competing mills governs the price which the purchaser pays. This fact should be kept in mind while considering the following analysis of the working out of the f.o.b. mill theory.

We have to assume that any company of sufficient capital to own a cement plant is intelligently managed and therefore has a one price policy. We also have to recognize that competition would force all cement plants in any district to have approximately the same base price. Therefore, following strictly an f.o.b. mill price method of quoting, a ce-

ment plant, or plants, having a common location, can serve only that territory in which they have as low, or lower, freight rates as any other cement mill, or mills. Applying such reasoning to the situation confronting our Indiana subsidiary, which has an advantage in freight rates in practically one-third of the State of Illinois, quoting as it necessarily must about the same base price as its competitors, it would be able to exclude any other company from all the territory in which it enjoys the lowest freight rate. Strict observance of this theory would mean that in a territory where a cement mill had an advantage in freight rates it could, by using the same base price as its competitors, have a monopoly of the cement business. That would not be a good thing for the purchasers of cement or for the manufacturers; the latter suffering because such a method would severally curtail the trade territory of a great many companies and destroy the value of many of the existing cement plants.

It might be argued that so strict a compliance with the method need not be enforced and that cement manufacturers could when they wanted to sell cement in a competitor's freight territory, shrink their mill base price sufficiently to make such sales possible. The idea is not a new one; it has been tried many times, but always proved impractical. Unscrupulous purchasers quick to discover the weakness of the method were frequently able to defeat the purposes of the manufacturer by ordering cement shipped to destinations which required the manufacturer to considerably shrink his base price. Such shipments while in transit were often diverted to a destination, or destinations, in a manufacturer's trade territory where his full base price governed, the unscrupulous purchaser thereby saving the difference between the manufacturer's full base price and the shrunken price at which the sale was made.

Such practices were decidedly injurious, not only to the cement manufacturers, but to the honest competitors of an unscrupulous purchaser, for by the latter's trickery he gained an advantage in price that enabled him to undersell his honest competitors.

Unquestionably any method of selling that places a premium on dishonesty is unsound and should not be used.

The sales method in general use of quoting prices at destination is thoroughly workable. It gives the manufacturer control of their shipments until they reach destination, thus preventing diversion enroute. Thereby the manufacturers are able to solicit business over a wide trade territory, sending their representatives and quotations as far afield as they feel they can afford to go and at the same time realize a reasonable net price. This prevents monopoly and induces active competition in all markets. It also affords the manufacturers opportunities to broaden the source of demand for their product and thereby affords them some assurance of stable plant operation in relation to the going business.

We have had a fixed policy for many years of quoting only f.o.b. destination. It has proved absolutely should [sic, "sound"†] and to our mind is the proper way to conduct our business. We are very desirous of cooperating with you and sincerely wish we could bring ourselves to feel that we should quote f.o.b. mill prices to the State of Illinois. However, thirty years' experience prompts the decision that we cannot afford to do so at the risk of destroying a policy which is so fundamental to the success of our company." (Com. Ex. 1113 A-C)

Neylan, Lone Star's Assistant General Sales Manager, was examined by Commission Counsel regarding Mr. Struckman's letter. He testified that he did not know what Struckman meant by "impractical" in the third paragraph, *supra*, and further that he did not "particularly" disagree with Struckman's statements (Tr. 6172-73). Asked why Lone Star did not give Illinois an f.o.b. mill price when they asked for it in this instance, Neylan testified:

"A. They asked for them, but did not want them.

Examiner Norwood: They merely thought they did?

The Witness: The proposal, as I recall it, very definitely stated that the prices would be compared with other factors taken into consideration, which indicated very clearly that they were not going to award on the basis of F.O.B. mill prices. What they were interested in was the price at destination.

By Mr. Wooden:

Q. Of course, every purchaser wants to know what it is going to cost him laid down where he wants to use it, but it is a different question what he wants to buy it at and where he wants to buy it. Do you think the Government in its now pending invitation for bids F.O.B. mill, really wants them F.O.B. mill? A. They do not.

Q. They do not. Does that mean that you will not give them what they ask for because you know they do not want what they ask for? A. I don't know what we will do." (Tr. 6180-81)

The President of Medusa, J. B. John, likewise wrote Governor Horner in response to his criticism of that company. Under date of May 1, 1933, John wrote:

"Our company does not make prices f.o.b. factory because we are dealing in a standard commodity, conforming to standard specifications of the United States Government and the American Society for Testing Materials. A difference of even a fraction of a cent per barrel in the delivery price is just as effective in determining the sale of our product as an eighth of a cent per bushel is in effecting the sale of grain.

If we made a mill price, to that would have to be added the freight to the various destinations to enable the State to know its cost and if our mill price plus freight made lower prices at destination than our competitors we would secure all of the business in the zone where these prices obtained. On the other hand, if a mill located somewhere else had a mill price and we did not meet the price at destination we would have no chance of getting a share of

the business. If our mill price plus the freight to delivery point was lower than that quoted by our competitors then immediately our competitors, to do business at those points of delivery, would have to meet these prices and overnight the prices at these destinations would be lowered.

Competitive manufacturers quotations are openly in the hands of the trade and we know from day to day what these prices are and open competition makes it necessary for us to meet them if we desire to get any share of the business.

In answer to the second question, I can say we would not be willing to bid f.o.b. factory because it would have the same effect as outlined in our answer to the first question. Frankly, we are trying to run our business on a basis that will net the cost of production or nearly so, and not further deplete our capital. Your records will indicate that the Medusa Company secured no part of the Illinois business last year because our bids were higher than those at which the cement was purchased and even at that our figures were well under the cost of production.

If we should start to handle our business on basis of making mill prices without reference to meeting prices that our competitors are making at destination, we would soon be in position where we would have no business." (Com. Ex. 1895 A, B)

Dawson, Vice President of Medusa was cross examined about Mr. John's letter. He testified that John "figured in bidding f.o.b. mill he was afraid he would not be competitive in price". And further:

"Q. And when you say that he was afraid, and you adopt that as your answer also—afraid he would not be competitive in price—do you mean to say he was afraid he would not make his price the same as his competitors? A. No; he had no means of knowing what the lowest price would be.

Q. But if any of the others quoted the same price, he would want to quote the price they did; is not that correct? A. No; not necessarily.

Q. What would he want to quote in a case like that? A. The lowest possible price that we could find in that market.

Q. And you would not want to quote any lower than that? A. If we could find a price lower there, we would meet it.

Q. Yes; but not lower than any price you could find? Is that what you mean by being competitive? A. No; by meeting the lowest price that is in existence.

Q. When you say 'by meeting the lowest price that is in existence,' you mean not making one lower than the lowest one. A. Not if we could help it.

Q. And if the lowest one happened to be the same as all the others, of course you would mean, then, to make a price the same as your competitors; is that correct? A. We do not know what our competitor is going bid.

Q. You stated if you quoted f.o.b. mill that you would not know what they were going to bid, and you could not be competitive. Is that our understanding of your answer of a few minutes ago? A. Not quite in that same form.

Q. Well, you form it again for us. A. I will put it this way: Asking us to bid, as they did in this case, on a very large quantity of cement, we would not be in a position to find out what the low price would be in any particular point of destination where the cement is going to be used.

Q. You mean the quotations of your competitors? A. Well, I would not say the quotations of our competitors, so much as any one of them.

Q. Any one quotation of your competitors? A. Any low one.

Q. Of your competitors? A. We find out what it is, if we possibly can, so as to meet that lowest price.

Q. And that was the reason you would not bid, f.o.b. mill? A. In that particular case it was, because it was a large quantity of cement involved.

* * *

(Continuing) It was a large quantity of cement involved, and you are either in or out, one or the

other. You had no chance to get a portion of the business. If you are low you get all of it. If you are high, you are out completely.

By Mr. MacIntyre:

Q. And that is the reason, as you have stated, in that case, for not bidding f.o.b. mill; the principal reason why you would not bid f.o.b. mill in the other instance? A. No.

Q. Well, what are the other reasons? A. I have been asked that question many times. It depends upon what the situation is and the conditions of the invitation to bid." (Tr. 40402-04)

and later:

"Q. Why don't you quote f.o.b. mill such as was the case when Governor Horner asked you to quote f.o.b. mill? A. Well, very few dealers or contractors, if any, have ever asked us to quote f.o.b. mill. They are interested in destination prices.

Q. Well, I am asking you, though, why your company did not quote f.o.b. mill as Governor Horner requested in 1933 and as is evidenced by Commission's Exhibit 1895 A and B, Mr. John's letter. (Tr. 40595)

• • •

A. The exhibit referred to answers that question completely.

By Mr. MacIntyre:

Q. And you want to use that as your answer now? A. I do." (Tr. 40598)

James Ackerman, then Sales Manager of Lawrence, wrote to Capt. D. J. Leehey, United States Engineers Office, Eastport, Maine, 10/23/35, explaining Lawrence's reasons for not bidding f.o.b. mill on a pending project, as follows:

"• • • I cannot help but feel that you were somewhat disappointed when we refrained from quoting you a price f.o.b. our plant at Thomaston. I feel sure you appreciate, however, that there must have been

good and sufficient reasons for our failure to do so. Let me deal with this problem as it relates to our company as well as our industry.

So that there can be no misunderstanding on this point, may we state at the outset that there is no agreement, understanding or provision, implied or otherwise, which would prevent us from quoting prices f.o.b. the mill should we choose to do so. Portland cement has been sold at delivered prices for the past 35 years and will probably continue to be sold on such a basis for many years to come. The sole consideration in the mind of the purchaser of cement is price, not price at the mill, but price at the point where the purchaser is going to use the cement. Competition for cement is centered at the point of consumption and not at the point of production. I think you will agree with me that it is a matter of economic law that buyers in a highly competitive market must at all times have definite and accurate price information. Many times in the past our industry or an individual member of it, has been criticized for failure to comply with requests which were not unreasonable or undesirable in and of themselves but nevertheless inconsistent with the requirements of our system taken as a whole.

We believe that every manufacturer of portland cement who has carefully studied the question of destination prices versus mill prices, has reached the inevitable conclusion that mill prices will result in complete disorganization, consternation and chaos in the marketing of our product." (Com. Ex. 1156 B-C)

Ackerman testified that by his reference to "disorganization" in the last paragraph of his letter he "probably had in mind" the company's experience when it was selling f.o.b. mill to trucks.[6] Summing up his position he said:

"I look upon our company as a wholesaler of cement, not a retailer. We depend on our dealers

[6] (C) Tr. 7266. And see in detail as to trucking, Part VI, *infra*.

as our retailers. We were in constant controversy and argument for various reasons with our customers, and I learned early in my selling experience that when you get into a controversy with your customer, you usually win the argument but lose the customer." (Tr. 7266).

Examined further by Commission counsel as to his attitude toward f.o.b. mill sales, Ackerman testified:

"Q. Mr. Ackerman, do you not believe that a customer is entitled to buy f.o.b. mill if thereby he can get a lower delivered cost to him at the place he wants it from one mill than from another? A. I might be willing to answer that question 'yes', but I also have myself to consider, Mr. Wooden. I want to be in a position to compete, don't I? I am trying to sell cement. I want to have an opportunity to get that business and be in a position to compete.

Q. Are you willing to take it at less than your competitors on a delivered basis? Is that what you mean by competition or do you want to make your price the same? A. I announced here earlier on this examination that we had a one-price policy. Bear that in mind. We do not make special prices, and I do not think we ever will. Now, if we start making a special price one place, that means in our language that everybody gets that price.

Q. That is not my question. A. That is in my mind.

• • •

Q. To sell f.o.b. mill might frequently result in your customer getting his cement at a lower delivered cost to him laid down where he wants to use it—he can get a lower delivered cost from one mill than from another. A. How?

Q. Because of the less freight that he may have to pay from one mill than from another. A. You are supposing something else, are you not? You have got several variables in there, as I see it.

Q. Sure. When the particular mill that makes the sale where the freight is decreased, the net realization on that mill goes up correspondingly, doesn't

it? A. That is sum and substance of what we do every day we do business.

Q. In other words, you are realizing different mill nets all the time from your different customers, depending upon where they are located? A. That is true. I wish they were all right by the mill.

Q. That is where your highest net realization is, is it? A. It is likely to be." (Tr. 7282-83)

And further with reference to an interview in 1936 with Commission investigator Widmann, Ackerman testified:

"Q. Did you say to him in substance that you were unwilling to quote an f.o.b. mill price as requested by the War Department on the Quoddy project, because to do so would give your company an advantage over competitors? A. I don't believe so.

Q. It would have given your company over in Maine an advantage over the competitors if you quoted f.o.b. mill, wouldn't it? A. It depends what price we named f.o.b. the mill. Remember, these people were talking about millions of barrels of cement, and buying a few barrels. I told them when I went up there to see them if they wanted to buy five or six million barrels of cement we would talk turkey with them.

Q. Did you say in substance to Mr. Widman that if you were to quote f.o.b. the mill that competitors would unquestionably take advantage of your company under similar circumstances? A. I may have said something along that line. I don't remember whether I said exactly that or not.

Q. That, in substance? A. My experience has shown me that my competitors are just as hungry for business as I am.

Q. Did you say to Mr. Widman that that situation would result in a cut-throat competition situation? A. I don't recall it.

Q. I am asking you now whether you think it would so result. A. Why, I don't recall the first part of your question. Whether what would result?

Q. Quoting f.o.b. mill, then having your competitor go you one better, and so on? A. Well, if your

competitor goes you one better you are going down the ladder.

Q. Did you say in substance to Mr. Widman that you had been through some price wars in the past of that sort? A. I may have said that. We have been through price wars.

Q. Based on that, or resulting from that kind of a policy of quoting f.o.b. mill? A. I don't think as a result of quoting f.o.b. mill—with the exception of the trucking experience, our experience does not go back far enough in the industry to say whether or not they ever did.

Q. Isn't that in line with what you wrote to sell f.o.b. mill would result in complete disorganization and consternation and chaos; isn't that what you meant by that? A. It all depends on what interpretation you put on those words. I would not like to be in a position of having a customer ask me what my price is at a given destination, and not be able to tell him. I think that would result in confusion.

• • •

Q. Did you say in substance to Mr. Widmann, that you had been through price wars from time to time and that you lived in constant fear of such wars? A. I may have said that. I tried to give Mr. Widmann an honest picture of the business, as I saw it. That is my recollection." (Tr. 7284-88)

Charles Hogan, President of Lone Star, testified at length on this subject with the aid of a series of maps covering the areas surrounding Lone Star's various mills. (See Tr. 34575-76, 34579, *et seq.*, Resp. Exs. 2459-2461.) This testimony is digested in Part XX, pp. , *infra*. The substance of Mr. Hogan's testimony was that his company has only one alternative to f.o.b. destination pricing; *i.e.*, selling f.o.b. mill at one price at the mill to all customers. The latter method to him has seemed unworkable, would make it impossible for Lone Star to continue in business in some areas and would give the company in effect a monopoly in others. He testified further

that the customer wants to know what the cement is going to cost where he wants to use it and no place else and that without some law to force everyone to sell at an f.o.b. mill price those companies which did adopt f.o.b. mill selling would be compelled to revert to destination pricing in order to compete with the companies which did not adopt the alternative.[7]

For the other evidence regarding the alternatives to their use of prices determined at destination see Part XX, *infra*.

4. Denials of Agreement as to Prices

Executives of 43 respondents testified specifically that their respective companies had no agreement or understanding with competitors to quote or use delivered prices or that they were free from any restriction not to quote or use f.o.b. mill prices.[1] Others, while not specifically referring to the use of f.o.b. mill prices, testified that they had no understanding or agreement with respect to their

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[7] (R) Tr. 34575-76.

[1] Aetna: Calvin, President (R) Tr. 30112.
Alpha: Coogan, Vice President (R) Tr. 24887.
Arkansas: Thompson, Sales Manager (R) Tr. 46536.
Ash Grove: Sunderland, President (C) Tr. 13597, 13600, 13742 (R) Tr. 47633-34.
Coplay: Blum, President (R) Tr. 48099.
Cumberland: Pearson, Secretary-Treasurer (R) Tr. 39851, 39820-21.
Dewey: Moore, R., W., Vice President (R) Tr. 46988, 46779, 47035.
Diamond: Raff, President (R) Tr. 47758.
Edison: Sweeney, Vice President (R) Tr. 35805-06, 35798.
Federal: Bates, J. E., Sales Manager (R) Tr. 30579.
Glens Falls: Titsworth, President (R) Tr. 47912.
Georgia: (Adopted) Tr. 37605-06.
Giant: (Adopted) Tr. 37605-06.
Green Bag, Pa.: Miller, A. J., Sales Manager (R) Tr. 47629.
Hawkeye: Manley, General Manager (R) Tr. 41714.
Hercules: Brobston, President (R) Tr. 26127.

prices or methods of pricing.[2] In addition, the evidence

Hermitage: McGovern, Sales Manager (R) Tr. 36121-22, 36334.
Idaho: Dufford (R) Tr. 47638-39.
Kosmos: Horner, President (R) Tr. 36892.
Lehigh: Bowen, Vice President (R) Tr. 27007-08.
Marquette: Colburn, Vice President (R) Tr. 39046, 39051-52.
Medusa: Dawson, Vice President (R) Tr. 40610.
Missouri: Alexander, President (R) Tr. 37122-23, 37167-69, 37221-22.
Monarch: Brooke, Vice President (R) Tr. 42337.
National: Dannelly, Vice President (R) Tr. 39705-06.
Nazareth: Robeson, Vice President (R) Tr. 28005.
Nebraska: Hoenig, Sales Manager (R) Tr. 42005.
Oklahoma: Thompson, Sales Manager (R) 46536-37.
Peerless: Russell, Vice President (R) Tr. 34273.
Pittsburgh: Letzkus, Sales Manager (R) Tr. 37902-03.
Southern States: Elcock, Vice President (R) Tr. 37501, 37605-06, 37597.
Southwestern: Warren, G. E., Vice President (R) Tr. 29037.
Blair, W. R., Sales Manager (El Paso), (R) Tr. 39240.
Standard: (Adopted) Tr. 37605-06.
Superior: Davis, President (R) Tr. 29557-58, 29582-83, 29597-98, 29634-35.
Three Forks: Short, Sales Manager (R) Tr. 47642.
Union: Gilson, Sales Manager (R) Tr. 47646.
Utah: (Adopted) Tr. 37605-06.
Volunteer: Hanahan, President (R) Tr. 38636.
Vulcanite: (Adopted) Tr. 37605-06.
Wabash: Jennings, H. F., President (R) Tr. 47651.
West Penn: McKee, Vice President (R) Tr. 27853.
Whitehall: Elliott, Vice President (R) Tr. 28497-98.
Wolverine: Nelson, J. L., Vice President (R) Tr. 35979.

[2] Bessemer: Warren, F. B., Vice President (R) Tr. 32101, 32098, 32104.
Green Bag, W. Va.: Wood, General Manager (R) Tr. 29407, 29513-16.
Huron: Rooney, Vice President (R) Tr. 33666.
Keystone: Scott, H. M., President (R) Tr. 27449.
Lawrence: Ackerman, Vice President (R) Tr. 31201, 31206.
North American: Porter, President (R) Tr. 33921-22, 34002.
Northwestern States: MacDonald, B. A., Vice President (R) Tr. 36482-83.

as to many respondents shows that they have quoted and sold at f.o.b. mill prices.[3]

C. The Cement Market and Identical Prices.

1. Extent of Identity Generally

[The Commission has found out (Par. 9(a)):

> "* * * under the conditions which have existed, a difference in price as small as one cent per barrel may divert business from one seller to another."

and further that:

> "In testifying, numerous officials of respondent companies stated that ordinarily the commercial prices of all sellers of cement at any given delivery point are the same * * * in general it is true that the commercial delivered prices of all respondents making sales of cement at any given location have been identical."

These findings are accepted in so far as they relate to the published or openly quoted prices of respondents.[4] Accordingly the evidence as to the fact of identity of commercial delivered prices among those companies which sell at common destinations will not be reviewed in detail; and the evidence as to the effect of a one cent difference in price among brands will be digested here only in so far as the evidence bears upon its relation to the question of identity.]

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[3] Edison: Sweeney, Vice President (R) Tr. 35636.
Kosmos: Horner, President (R) Tr. 36813, 36932-33, 36942-47.
National: Dannelly, Vice President (R) Tr. 39627-28, 39652.
Peerless: Russell, Vice President (R) Tr. 34232.
Utah: Com. Exs. 2703 (15-17); 3137 C.
Southern States: Elcock, Vice President (R) Tr. 37501.

And see digest of evidence as to Trucking, Part VI, E, *infra*, and Cement Pricing—Sealed Bids, Part IV, *infra*.

[4] See evidence respecting "Secret Price Cuts", Sec. 4, *infra*, pp. 254 *et seq.*

2. Absence of Brand Preference as a Price Consideration

a. Buyer Will Not Pay More For One Brand Than Another

The evidence is uncontroverted that cement buyers will not pay one cent more at the point of delivery for one brand of cement than another.[1] Representatives of respondents testified that buyers of cement insist that the one from whom they purchase give them a price at the point of delivery as low as the lowest price obtainable from any other seller and that no seller can sell him at any higher

[1] Bessemer: Warren, F. B., Vice President (R) Tr. 32095.
Dewey: Bass, Attorney-Examiner, F.T.C. (C) Tr. 13458 (reporting interview with F. Tyler, President).
Kosmos: Horner, President (C) Tr. 12438; (R) Tr. 36808.
Lone Star: Neylan, Asst. General Sales Manager (C) Tr. 6259.
Koch, Vice President (R) Tr. 32658.
Medusa: Dawson, Vice President (R) Tr. 40045, 40527-28.
Missouri: Alexander, President (R) Tr. 37121.
Penn-Dixie: Browder, Traffic Manager (R) Tr. 38143-44.
Com. Ex. 3135 A-E: Letter dated July 17, 1931, Killian, Secretary-Treasurer, Penn-Dixie to Anderson, Chief Examiner, F.T.C.
Petoskey: Lucas, Vice President (R) Tr. 38744.
Pittsburgh: Letzkus, Sales Manager (R) Tr. 37689.
Southwestern: Blair, W. R., Sales Manager (El Paso) (R) Tr. 38944.
Warren, G. E., Vice President (Osborn) (R) Tr. 29037.
Universal Atlas: Affleck, President (R) Tr. 34832, 34840-41, 34847, 34859.
Wolverine: Nelson, J. L., Vice President (R) Tr. 35900.
McCracken, Dealer (R) Tr. 36753.

price.[2] They testified further that in selling cement, therefore, if a company wants business at a given destination

[2] Aetna: Calvin, President (R) Tr. 30018.
Alpha: Coogan, Vice President (R) Tr. 23364, 24351, 24605-06.
Fellows, Sales Manager (R) Tr. 25882.
Ash Grove: Com. Ex. 971-14 z.
Dewey: Moore, R. W., Vice President (R) Tr. 46882-83.
Bass, Attorney-Examiner, F.T.C. (C) Tr. 13458 (reporting Tyler).
Federal: Bates, J. E., Sales Manager (R) Tr. 30593-94.
Georgia: Adoption, Tr. 38744.
Giant: Adoption, Tr. 38744.
Hawkeye: Manley, General Manager (R) Tr. 41615, 41863, 41893-94.
Hercules: Brobston, President (R) Tr. 26444; Resp. Ex. 1086 A.
Hermitage: McGovern, Sales Manager (R) Tr. 36342-43.
Kosmos: Horner, President (C) Tr. 12438; (R) Tr. 36807-08.
Lone Star: Koch, Vice President (R) Tr. 33283.
Louisville: Hill, Vice President (C) Tr. 13274-76.
Marquette: Colburn, Vice President (R) Tr. 39962-63.
Medusa: Dawson, Vice President (R) Tr. 40517, 40526.
Missouri: Alexander, President (R) Tr. 37120-22.
Peerless: Russell, Vice President (R) Tr. 34337, 34477-79.
Penn-Dixie: Browder, Traffic Manager (R) Tr. 38142-44, 38601.
Petoskey: Lucas, H., Vice President (R) Tr. 38747.
Pittsburgh: Letzkus, Sales Manager (R) Tr. 37689, 37692-93.
Southwestern: Warren, G. E., Vice President (Osborn) (R) Tr. 29035-36.
Blair, W. R., Sales Manager (El Paso) (R) Tr. 39333-34.
Standard: Adoption, Tr. 38744.
Universal Atlas: Affleck, President (R) Tr. 34832, 34837, 34840-41.
Utah: Adoption, Tr. 38744.
Vulcanite: Adoption, Tr. 38744.
West Penn: McKee, Vice President (R) Tr. 27697-98.
Wolverine: Nelson, J. L., Vice President (R) Tr. 35900, 35901.

it must adjust its price downward to meet the lowest known price at that destination or forego the business.[8]

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[8] Aetna: Calvin, President (R) Tr. 30018; Resp. Ex. 1996 (file memorandum).
Alpha: Fellows, Sales Manager (R) Tr. 25492-93, 25833, 25880-82.
Postelle, Sales Manager (R) Tr. 25443-44.
Ash Grove: Sunderland, President (C) Tr. 13639-40, 13596; Com. Ex. 971-14 Z.
Consolidated: Storey, President (R) Tr. 47586-87.
Cumberland: Pearson, Secretary-Treasurer (R) Tr. 39850-52; Com. Ex. 3132 D.
Dewey: Moore, R. W., Vice President (R) Tr. 46986-87.
Bass, Attorney-Examiner, F.T.C. (C) Tr. 13458 (reporting Tyler).
Edison: Sweeney, Vice President (R) Tr. 35639, 35643-44, 35826-27.
Federal: Bates, J. E., Sales Manager (R) Tr. 30532, 30547, 30591-93.
Florida: Storey, Vice President (R) Tr. 47586-87.
Glens Falls: Titsworth, President (R) Tr. 47891, 47930.
Green Bag, W. Va.: Wood, General Manager (R) Tr. 29407.
Hawkeye: Manley, General Manager (R) Tr. 41615.
Hercules: Brobston, President (C) Tr. 10607-08; (R) Tr. 26101-02, 26380-81, 26383-84.
Hermitage: McGovern, Sales Manager (R) Tr. 36125, 36127, 36329, 36343.
Huron: Crapo, Vice President (C) Tr. 11386-87.
Kosmos: Horner, President (C) Tr. 12442-43; (R) Tr. 36859, 36860.
Lawrence: Ackerman, Vice President (R) Tr. 31223, 31307-09.
Lehigh: Bowen, Vice President (R) Tr. 27108-09.
Lone Star: Koch, Vice President (R) Tr. 33283.
Hogan, President (R) Tr. 34647.
Louisville: Hill, Vice President (C) Tr. 13397.
Marquette: Colburn, Vice President (R) Tr. 39962-63.
Medusa: Dawson, Vice President (R) Tr. 40045-46, 40061-62, 40527-28.
Missouri: Alexander, President (R) Tr. 37120-22.
National: Dannelly, Vice President (R) Tr. 39628, 39733.
Nazareth: Robeson, Vice President (R) Tr. 28004-05, 28014, 28205-06, 28398, 28416, 28419.

L. T. Sunderland, President of Ash Grove, expressed the foregoing in a letter to Commissioner Meade of the Bureau of Reclamation on March 31, 1934, in answer to an inquiry by the Commissioner as to the "manner in which an agreement to submit identical bids was reached" (Com. Exs. 103-104). Sunderland wrote:

> "This Company has been party to no such agreement, nor do we know of any such agreement. In every instance where this Company has submitted bids, it has quoted the market price, such market price being the lowest found in our market field and filed by any member of our industry with the Code Authority for the cement industry.
>
> It has been *erroneously* assumed, and often publicly stated by uninformed persons, that where prices of cement have been found to be uniform such uniformity was not only evidence, but conclusive proof, of collusion on the part of the bidders. Portland

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Nebraska: Hoenig, Sales Manager (R) Tr. 42014.
North American: Harte, Vice President (C) Tr. 7512-13, 8256.
Northwestern States: MacDonald, B. A., Vice President (R) Tr. 36481, 36636-40.
Peerless: Russell, Vice President (R) Tr. 34337.
Penn-Dixie: Browder, Traffic Manager (R) Tr. 38141-42, 38487, 38600-01.
Petoskey: Lucas, Vice President (R) Tr. 38744, 38747, 38833.
Pittsburgh: Letzkus, Sales Manager (R) Tr. 37690, 37693-94, 38022.
Signal Mountain: Storey, Vice President (R) Tr. 47586-87.
Southwestern: Blair, W. R., Sales Manager (El Paso), (R) Tr. 38944-45.
Royal, Attorney, F.T.C. (C) Tr. 21671-72 (reporting Merrill).
Warren, G. E., Vice President (Osborn), (R) Tr. 28769, 28773.
Jennings, Former Manager (Osborn), (C) Tr. 11172-73.
Superior: Davis, President (R) Tr. 29675.
Trinity: Storey, Vice President (R) Tr. 47586-87; Com. Ex. 971-12.V.
Universal Atlas: Affleck, President (R) Tr. 34837, 34838.
Wolverine: Nelson, J. L., Vice President (R) Tr. 35901, 35905-06.

cement, as you of course are informed, is a commercially-standardized product. Neither the Government, nor any other large buyer, will pay one bidder one cent (1¢) more for his cement than for the same standard cement offered by any other bidder at the same destination.

Therefore the price of standard portland cement at any destination is determined by the lowest price at which any member of the industry is willing to sell its product for delivery thereat; and if any competitor expects to get any business, *such competitor* must meet such lowest price." (Com. Ex. 104)

J. S. Young, President of Lehigh, writing to Professors Burns and Clark[4] in answer to an inquiry connected with their analysis of cement marketing methods, said:

"If there has been one fact definitely established in the marketing of cement, it is that no manufacturer can command a premium in price, that differences of a fraction of a cent determine orders." (Com. Ex. 913-4 A, 4 B)

H. Struckmann, former President of Lone Star, in a letter to Governor Horner of Illinois on April 18, 1933 wrote:

"The charge frequently levied against the cement industry of collusion arises from the fact that prices of different companies at any destination are generally the same. Identical prices are not the result of collusion but the natural result of aggressive competition. Cement is a standardized product and no informed buyer will pay more for one particular brand than for another. No manufacturer can afford to continue to sell cement below cost and for the reason stated he cannot obtain more for his product than the lowest price prevailing. Consequently in offering bids he quotes for each destination the lowest price of which he has any knowledge and hopes that none of his competitors will quote lower. This is particularly true in the Middlewest at this time, where the prevailing prices are so low that it is

[4]The evidence as to the Burns & Clark Survey is digested in Part XI, D, *infra*.

certain that anyone obtaining business thereon will be pretty apt to suffer a loss." (Resp. Ex. 22 A, B)

Affleck, former President of Universal Atlas, said "we can not sell a barrel of cement if our price is higher than our competitor's price"[5] and that

> "Nobody will pay more for cement than the price at which he can buy it. The customer practically makes the price uniform." (Tr. 34847)
>
> • • •
>
> "• • • uniformity of price, • • • is a thing not invented and forced upon the public by the cement makers. It's a—it's a thing that is brought about completely, as I see the picture, by the cement buyers. They will not pay more for anybody's cement than they can buy cement for, and that tends to bring it down to a level" (Tr. 34947)

Blair, Sales Manager of Southwestern, at its El Paso, Texas mill said:

> "Cement purchasers are well informed and will not pay more for one brand of cement than for another." (Tr. 38944)

The testimony of cement buyers was to the same effect. Thus McCracken, Louisville cement dealer, testified that he would not pay a cent more for one brand of cement than another.[6] Rice, attorney for the War Department, a Commission witness testified that his department could not pay a penny more for one cement than another, as long as it met the specification requirements.[7]

Attorney Examiner Bass of the FTC testified concerning interviews he had had with cement manufacturers in 1931 and recounting a conversation with F. E. Tyler, President of Dewey, said:

> "• • • he further stated that when a competitor makes a lower price, that Dewey has no alternative

[5] (R) Tr. 34832, 34841.

[6] (R) Tr. 36753.

[7] (C) Tr. 1737.

except to meet it, because cement is cement, and he couldn't get one cent more per barrel for his cement, and then if the price went up, he wanted to get as much money as possible and he raised his price also." (Tr. 13458)

Testimony in another case, introduced by the Commission shows the following examination of Harry Koch, Vice President of Lone Star:

"Q. Why are all cement prices or practically all cement prices identical * * * at destination? A. Because as I told a Department of Justice man one time, when I was much younger in this business, the other fellow could not get any more than I could and if I had my way he could not sell for any less." (Com. Ex. 3245 A)

Mr. Koch was asked about this by Commission Counsel:

"Q. In other words, you would not, if you had your way, let the other man sell for any less than you, and, by the same token, you would not want to sell for any less than he did? A. No, I don't think you get the purport of what I had in mind. What I mean is, Mr. Wooden, he can't get more, and if I am interested in the business I wouldn't let him sell for less, I would meet him." (Tr. 33283)

George Warren, Vice President of Southwestern, testified that in his experience there can be "only one price for standard Portland cement, a known price, or a public price in a given market at a given time," and that he never knew "a time when there were two effective published prices on cement in the same market at the same time."[9] He was then asked why he did not attempt to maintain a price different from the market price and answered that:

"The customer will buy at the lowest price offered. (Tr. 29036)

* * *

Q. Well, in your experience, have you ever found any customer that was willing to pay a penny more

[9] (R) Tr. 29035.

for one of these different cements than others? A. No, the preferences generally do not go to willingness to pay a higher price for one as against another." (Tr. 29037)[9]

Vice President Hill of the non-respondent Louisville Cement Company, testified that "If I want the business at that particular point, I will have to meet the price that the other man has quoted."[10]

Dawson, Vice President of Medusa, testified:[11]

> "Medusa has never found either a dealer or contractor willing to pay more for Medusa cement than for a competitor's brand, except during such periods as 1921 to 1923 in the States of Michigan and Wisconsin, when there was a shortage of cement and anyone with a stock cement on hand could command a premium. Medusa has not only found that it cannot sell cement for more than its competitors, but it has also found that it cannot permit any competitor to sell cement in any market at a price less than that quoted by Medusa, or else customers will not purchase cement from Medusa and Medusa will be eliminated from that Market." (Tr. 40045-46)

On cross-examination by Commission Counsel Mr. Dawson testified as follows:

> "Q. Now, * * * you have stated that Medusa will be eliminated from a market if it did not meet the price of its competitors. I am asking you to state whether or not in your experience that Medusa ever attempted to carry on business in any particular market in quoting prices higher than its competitors? A. Excluding the period * * * during the shortage of cement, I do not recall of Medusa of ever selling cement at a price higher than their competitors were quoting.
>
> Q. How can you then conclude, as you did in the

[9] See also Tr. 38773.

[10] (C) Tr. 13297.

[11] To the same effect, see Lucas, Vice President, Petoskey (R) Tr. 38744; Nelson, J. L., Vice President, Wolverine (R) Tr. 35900-01.

last sentence of that paragraph, that Medusa would be eliminated if it has never tried it out? (Tr. 40526-27)

* * *

A. For the reason that a dealer will not, or no one else, will pay you a premium for cement. It is a standard product. We never quote, to my knowledge, send a price out that we thought was higher than our competitors. What we are always trying to do is to find what the low price is so we can be competitive and remain in the market." (Tr. 40527-28)

Penn Dixie answering an FTC questionnaire in 1931 stated:

"* * * If we do not meet competitors' delivered prices we cannot sell our cement and are out of the market for the reason that cement is a standardized product, all of it manufactured and sold to meet the Standard Specifications of the American Society for Testing Materials and of the United States Government. Consequently, for all practical purposes, one brand of cement is as good as another and no one company can sell its brand at a higher price than a competing brand." (Tr. 8098)

There was a large body of other testimony to the same effect.[12]

[12] Aetna: Calvin, President (R) Tr. 30018.
Coplay: Twamley, Vice President (C) Tr. 6762.
Dewey: Moore, R. W., Vice President (R) Tr. 46882-83.
Hawkeye: Manley, General Manager (R) Tr. 41863.
Huron: Crapo, Vice President (C) Tr. 11387.
Kosmos: Horner, President (C) Tr. 12439.
Lehigh: Bowen, Vice President (R) Tr. 27108.
Nazareth: Robeson, Vice President (R) Tr. 28205.
Northwestern States: MacDonald, B. A., Vice President (R) Tr. 36481.
Peerless: Russell, Vice President (R) Tr. 34337.
Petoskey: Lucas, Vice President (R) Tr. 38744.
Southwestern: Partridge, Sales Manager (R) Tr. 47660.
Superior: Davis, President (R) Tr. 29675.
Universal Atlas: Affleck, President (R) Tr. 34832, 34841.
Wolverine: Nelson, J. L., Vice President (R) Tr. 35900-01.

3. How Cement Prices Become Known

[The findings of the Commission refer to the manner in which respondents keep currently advised of prices of competitors as follows (Par. 9(e)):

> "Except to the extent that the dissemination of delivered prices during the NRA Code period and some seven months thereafter necessarily carried with it an exchange of base prices, and except for limited direct exchanges among certain respondents which the record does not show to have been made under the auspices of the Institute, there has been no systematic exchange among the corporate respondents of basing-point prices or changes in such prices. No such exchange is needed in the successful operation of the multiple basing-point delivered-price system. When a corporate respondent makes a change in its base price, written delivered-price quotations reflecting this change are usually sent to all customers. Through common customers and through salesmen in the field, information concerning this change reaches the other respondents selling cement in that area almost immediately. Examination of a reasonable number of the new price quotations reveals the pattern followed and thus discloses the base price change made."

This finding is accepted in so far as it finds that prices are not exchanged among respondents nor sent by one respondent to another, and in so far as it finds that the individual respondents disseminate their prices only to customers and obtain their knowledge of competitors' prices only through customers. The evidence on those subjects is accordingly only briefly summarized herein. The evidence as to the extent to which delivered price quotations reflect basing points and as to the analysis of delivered prices indulged in by respondents to determine the pattern, if any, reflected thereby is collected and digested in Section D, 1 and 5, beginning at pp. 336 and 409, respectively, *infra*.]

a. Quoting Prices

"When a corporate respondent makes a change in its base price written delivered price quotations reflecting this change are usually sent to all customers."[1] This has been known as "broadcasting" prices.[2] Some manufacfacturers have done so for twenty years or more.[3] Broadcasting quotations is not limited to changes in base prices.[4] The quotation shows the company's delivered price at the location of the customer to whom it is addressed.

J. F. McCracken, a building material dealer at Louisville, Kentucky, identified a number of manufacturers' quotations received by him from companies doing business in his area, and these were received in evidence after a concession by Commission counsel that "these are similar to hundreds of other such things that are already in evidence" and upon the express condition that further "similar offers will not be made of this kind of stuff."[5] A typical quotation of the respondent Long Star (Resp. Ex. 2730 C-D) and of the non-respondent Louisville Cement Company (Resp. Ex. 2730 E-F) so identified by McCracken are reproduced on pages 215-218.

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[1] Fdgs., Par. 9(e).

[2] Letzkus, Sales Manager, Pittsburgh (R) Tr. 37693.

[3] Alpha: Coogan, Vice President (R) Tr. 23177-78.
Arkansas: Thompson, Sales Manager (R) Tr. 46493.
Kosmos: Horner, President (R) Tr. 36821.
Medusa: Dawson, Vice President (R) Tr. 49049.
Nebraska: Hoenig, Sales Manager (R) Tr. 42008-09.
Oklahoma: Thompson, Sales Manager (R) Tr. 46493.

[4] See evidence as to arbitrary and other prices which do not reflect a base, *infra*, pp. 557 *et seq.*

[5] (R) Tr. 36742-43.
Resp. Ex. 2730 A-P

QUOTATION

LONE STAR CEMENT CORPORATION

MANUFACTURERS OF LONE STAR AND 'INCOR' PORTLAND CEMENT

OFFICES, ALBANY, BIRMINGHAM, BOSTON, CHICAGO, DALLAS, DENVER, INDIANAPOLIS, KANSAS CITY, NEW ORLEANS, NEW YORK, NORFOLK, PHILADELPHIA, ST. LOUIS, WASHINGTON, D. C.

1108 MERCHANTS BANK BLDG.
INDIANAPOLIS, INDIANA

DEC 2 8 1936

American Builders Supply Co.
Louisville,
Kentucky.

Effective JAN 1 1937 , we quote the following prices delivered in carload lots f. o. b. cars your Railway Station at as above

LONE STAR Portland Cement	$ 2.40	Per Barrel, including four cloth sacks. In paper containers twenty-five (25) cents per barrel less than price quoted in cloth. In bulk forty-five (45) cents less than price quoted in cloth.
'INCOR' High-Early-Strength Portland Cement	$ 2.65	Per Barrel in paper bags. Shipments will be made in full carload lots or in mixed carload lots with LONE STAR Portland Cement.

These prices are subject to the terms and conditions appearing on the back hereof. Orders delivered in writing at our Office, bearing postmark at point of mailing prior to effective date of this quotation, will be accepted for immediate shipment or for shipment within fifteen (15) days from the effective date of this quotation. Should you desire price for specific work, we shall be pleased to quote you upon receipt of detailed information, including quantity and time of delivery. We solicit your valued patronage and assure you of prompt and courteous treatment.

Yours very truly,

LONE STAR CEMENT CORPORATION

M. J. Young

Division Sales Manager

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TERMS AND PAYMENTS: On approved credit net cash in thirty (30) days or ten (10) cents per barrel discount for cash in fifteen (15) days from date of invoice. Payments are to be made in cash or equivalent at SELLER'S Office. Freight charges per tariff applying from point of shipment to place of delivery to be paid by BUYER for account of SELLER, the original paid freight bill to be sent to SELLER promptly for a proper computation.

If financial responsibility of the BUYER becomes impaired or unsatisfactory to SELLER, the right is reserved to SELLER to require payment in advance of shipment, or security or guaranty satisfactory to SELLER that invoices will be promptly paid when due. If BUYER fails to comply with SELLER'S terms of payment, SELLER reserves the right to cancel unfilled portion of any contract or order. BUYER remaining liable for all unpaid accounts. No waiver of such right shall be implied from any failure by SELLER to exercise the same.

All orders and/or acceptance of quotations are subject to written approval or acknowledgment by our Division Sales Manager, mailed or delivered to you.

PACKAGE: Title to all Loose Brass cloth sacks shall at all times remain in SELLER. BUYER agrees to return said cloth sacks to SELLER'S Mill within ninety (90) days from the date of shipment of cement said knowledge. To assure the return of these sacks to SELLER, a deposit at the rate of ten (10) cents per sack shipped will be required. This deposit has been included in the price herein stated and BUYER agrees to include it when payment for the cement is made.

Upon the return of the Loose Brass cloth sacks in which the cement is packed, and their receipt at SELLER'S Mill within ninety (90) days from the date of shipment of cement, in serviceable condition, subject to SELLER'S inspection and count, and handled in accordance with current prevailing rules, SELLER will credit or refund BUYER the deposit above made. In case the sacks returned are not in serviceable condition, SELLER shall be entitled to retain the deposit as compensation for damaged sacks and SELLER will hold the sacks for the account and risk of the shipper for thirty (30) days.

SELLER may charge the deposit to be made for sacks, in which case the deposit herein provided and the payment to be made on the return of sacks shall increase or decrease according to SELLER'S deposit requirements prevailing at time of shipment of the sacks by SELLER. SELLER agrees to pay carriers' freight charges on returned empty cloth sacks of SELLER'S brand after delivery to SELLER'S Mill or to refund BUYER for freight charges prepaid on such shipments upon presentation of original bill of lading properly executed or original receipted freight bill.

Paper bags are not returnable.

SHIPMENTS: The BUYER shall give the SELLER shipping instructions in writing a reasonable time before shipments are desired. Shipping instructions and orders shall be delivered to the office of the SELLER.

SELLER shall not be liable to BUYER for any delays in manufacturing, shipping or delivering said cement, caused by fire, strikes, lockouts, differences with workmen, accidents, war, insurrection, inability to secure cars, coal, or other material, governmental interference or regulations, delays in transportation, or contingencies beyond SELLER'S control. During the time of such delays, SELLER shall have the right to prorate among its various customers such cement as it may be able to manufacture and ship. SELLER shall have the right, but shall not be obligated, to ship from any plant other than the one normally supplying the delivery point specified herein.

SELLER reserves the right to select the route and method by which shipments shall be forwarded, but cannot be required to favor any one route or method of transportation as against another.

CLAIMS: Claims for loss or damage will not be considered unless supported by said record and railroad agent's acknowledgment on freight bill. Freight overcharge claims must be accompanied by original receipted freight bills.

SPECIFICATIONS: The cement shipped under this agreement shall conform to the present standard specifications for Portland Cement and/or High Early Strength Portland Cement of the American Society for Testing Materials and the American Standards Association and/or the Federal Specifications Board, and no other warranty is made in regard thereof.

SELLER, having no control over the use of cement after delivery to BUYER, therefore guarantees finished work in which it is used, nor shall SELLER be responsible for the condition of cement after delivery to BUYER.

[illegible] contained in quotations or sales made by or on behalf of BUYER or deviations therefrom unless such modifications shall be [illegible]

LOUISVILLE CEMENT COMPANY

GENERAL OFFICES
LOUISVILLE, KY.

PORTLAND CEMENT MILLS
[illegible]

LOUISVILLE, KY.
DEC 30 1936

American Builders Supply Company
437 Garden Street,
Louisville, Kentucky

EFFECTIVE: JAN 1 1937

We quote for immediate acceptance for shipment upon receipt of order or within 15 days from date of order, in either straight or mixed carload lots, f. o. b. cars your railway station as follows:

	[illegible] PORTLAND CEMENT	[illegible] WATER [illegible] PORTLAND CEMENT	[illegible]
[illegible]	2.40		
[illegible]	2.15	2.65	

Terms of Payment: Net cash in thirty days or 10 cents a barrel discount for payment in 15 days from date of invoice.

Prices quoted are subject to terms and conditions on both sides hereof.

Should you desire prices for specific work for shipment later than 15 days from date, please give specific information including description of work, quantity and time of delivery.

Yours very truly,

LOUISVILLE CEMENT COMPANY

3

TERMS OF PAYMENT—Are cash in thirty days or 98 cents a barrel discount for payment within fifteen days from date of invoice.

If at any time the financial responsibility of Purchaser becomes impaired or unsatisfactory to Consol Company, it reserves the right to require payments in advance or an satisfactory security or guarantee that invoices will be promptly paid when due.

If Purchaser fails to comply with terms of payment or with any of the other terms of sale, Consol Company reserves the right to cancel unfilled portion of any contract or order, Purchaser remaining liable for all unpaid accounts.

All sales to be performed by the Purchaser are conditions precedent to any and all of the liabilities of the Consol Company hereby, and of which the Purchaser are advised by it, be prevented from or delayed in performing the contract, whether by reason of fire, explosion, accidents, riots, insurrections, breakdowns, or delays in plant, mill, or mines, strikes, lockouts, war, insurrection, hostilities, or delays in transportation, or any other material, governmental interference or interruption, delays in transportation of cars, embargoes beyond the Consol Company's control, and during the time of such delays the Consol Company shall have the right to proceed under the Consol Company's contracts with such reasons as the Consol Company may be able to manufacture and ship.

PRICES—The prices quoted are based on the present rates of freight, and are subject to advance or reduction as the freight rates may be advanced or reduced.

PACKAGES—Cloth sacks bearing the "Consol" and "Pittsburgh" brands in this contract is quoted and shipped only by the Consol Company and are for a period of 120 days from delivery by the Consol Company of the said product hereof by it to the Purchaser or a carrier of such goods, after which time it reserves to the right to cancel contract to date which shall not have been delivered, Purchaser agrees to pay at above rate and on same terms as payment for amount of sale.

Purchaser agrees within 120 days of delivery of the product to deliver to the Consol Company, the goods at Dock, Buffalo, or Tonawanda, New York, properly loaded and in condition to insure complete identification (as provided for by Railroad Companies and Lines) of such sacks bearing Consol Company's brand, in which the said product is packed. The Consol Company agrees to refund to the purchaser 5 cents per sack and cloth sacks as delivered in good condition, subject to the Consol Company's count and inspection.

The Consol Company may commission of the product during 1915 and ordered 100 of Consol Company's sacks bearing its trademark "Consol" and "Pittsburgh" brands (brand on different bottom) on ordered sacks such sacks bearing "Consol" and "Pittsburgh" brands.

All cloth sacks bearing "Consol" brand are to be returned to Consol Company with all cloth sacks bearing the "Pittsburgh" brand are to be returned to the plant from which the shipment of Pittsburgh was made.

The price of cement packed in paper bags includes the paper bags, which are not returnable. Shipments in paper bags are made at Purchaser's risk of breakage and in without loss of cement.

DEMURRAGE—Purchaser shall allow Consol Company eighty hours (Sundays and holidays excepted) in which to load cars. If Purchaser fails to make shipments of cement within time provided herein, the Consol Company shall have the right to cancel the order for delivery but shall not be obliged except at its own option to do so.

The Consol Company reserves the right to select the route by which shipments shall be forwarded and to make shipments through freight prepaid or collect at its option.

SPECIFICATIONS—Consol, is to conform to the current Standard Specifications and Tests as adopted by the American Society for Testing Materials and the United States Government.

CLAIMS for loss or damage will not be considered unless Consol Company is notified within 5 days after receipt of shipment and only when supported by said receipt and inclosed copies of correspondence on which bill. Freight overcharge claims must be supported by original receipted freight bill.

The practice varies as to the frequency with which the various companies broadcast their quotations. Some companies send them out only when their prices change,[6] others send them out periodically to all their customers whether or not their prices have changed[7] while other companies send out quotations irregularly or only occasionally.[8]

The testimony is that there has been no agreement or understanding regarding the custom of broadcasting prices nor as to adhering to the prices so published.[9]

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[6] Aetna: Calvin, President (R) Tr. 30027-28.
Bessemer: Warren, F. B., Vice President (R) Tr. 32102, 32353.
Cumberland: Pearson, Secretary-Treasurer (R) Tr. 39853.
Edison: Sweeney, Vice President (R) Tr. 35640.
Federal: Bates, J. E., Sales Manager (R) Tr. 30566-67.
Hermitage: McGovern, Sales Manager (R) Tr. 36136.
Missouri: Alexander, President (R) Tr. 37120.
National: Dannelly, Vice President (R) Tr. 39633-34.
Northwestern States: MacDonald, B. A., Vice President (R) Tr. 36481.
Peerless: Russell, Vice President (R) Tr. 34339.
Penn-Dixie: Browder, Traffic Manager (R) Tr. 38143.
Southern States: Elcock, Vice President (R) Tr. 37510.
Wolverine: Nelson, J. L., Vice President (R) Tr. 35902.

[7] Alpha: Coogan, Vice President (R) Tr. 23177-78.
Hawkeye: Manley, General Manager (R) Tr. 41839-40.
Lehigh: Bowen, Vice President (R) Tr. 26772.
Nazareth: Robeson, Vice President (R) Tr. 28019.
Petoskey: Lucas, Vice President (R) Tr. 38756.
Southwestern: Warren, G. E., Vice President (Osborn, Ohio mill) (R) Tr. 28801.

[8] Green Bag, W. Va.: Wood, General Manager (R) Tr. 29531-32.
Kosmos: Horner, President (R) Tr. 36821.
Nebraska: Hoenig, Sales Manager (R) Tr. 42009.

[9] Alpha: Coogan, Vice President (R) Tr. 23992-93.
Arkansas: Thompson, Sales Manager (R) Tr. 46498.
Bessemer: Warren, F. B., Vice President (R) Tr. 32350, 32353-54.
Cumberland: Pearson, Secretary-Treasurer (R) Tr. 39851-53.
Diamond: Raff, President (R) Tr. 47758.

b. Knowledge of Prices

"Through common customers and through salesmen in the field" information concerning price changes reaches the other companies selling cement in the area "almost immediately".[1] By reason of the broadcasting of prices to customers and the speed with which competing manufacturers learn of them in the field, cement prices are a matter of common knowledge among producers and buyers. Following is a digest of the general evidence to this effect:

Federal: Bates, J. E., Sales Manager (R) Tr. 30588.
Glens Falls: Titsworth, President (R) Tr. 47900.
Hawkeye: Manley, General Manager (R) Tr. 41617.
Hercules: Brobston, President (R) Tr. 26079-82, 26136-37, 26141-42, 26456.
Hermitage: McGovern, Sales Manager (R) Tr. 36135-38.
Kosmos: Horner, President (R) Tr. 36811, 36921, 36924.
Lawrence: Ackerman, Vice President (R) Tr. 31228.
Lone Star: Koch, Vice President (R) Tr. 32771-72.
Medusa: Dawson, Vice President (R) Tr. 40043-44, 40049, 40539-40.
Missouri: Alexander, President (R) Tr. 37119, 37123.
Monarch: Brooke, Vice President (R) Tr. 42304.
National: Dannelly, Vice President (R) Tr. 39634.
North American: Porter, President (R) Tr. 33869-70, 34042-44.
Northwestern States: MacDonald, B. A., Vice President (R) Tr. 36480-83.
Oklahoma: Thompson, Sales Manager (R) Tr. 46498.
Peerless: Russell, Vice President (R) Tr. 34335-36.
Petoskey: Lucas, Vice President (R) Tr. 38703, 38747.
Pittsburgh: Letzkus, Sales Manager (R) Tr. 37693.
Southwestern: Apt, Traffic Manager (Osborn) (R) Tr. 39446.
Warren, G. E., Vice President (R) Tr. 28809-11.
Universal Atlas: Affleck, President (R) Tr. 34855-57.
Stone, Vice President (R) Tr. 35289-90.
Volunteer: Roberts, Traffic Manager (R) Tr. 31713-14.
West Penn: McKee, Vice President (R) Tr. 27697-99.
Wolverine: Nelson, J. L., Vice President (R) Tr. 35899-900, 35904.

[1] Fdgs., Par. 9(e).

Coogan, Vice President of Alpha, told the Senate Interstate Commerce Committee:

> "Prices for cement are not secret. Quotations are circulated very freely and very frequently. And we all know what the price of cement is." (Resp. Ex. 3744, See Tr. 23058)

Asked how Alpha keeps informed of the lowest openly quoted prices at a given destination, Coogan testified:

> "You must bear in mind that while the Alpha company has a large number of dealers, I should say we probably quote about three thousand, I dare say probably twenty-nine hundred of those dealers are also quoted by one or several of our competitors, so that when they get a quotation it is no secret, they make it public, and today, anybody with nothing more than ordinary intelligence can go into Binghamton, or any other town, and very quickly learn the price being quoted on cement in that particular market.
>
> And I could do that in practically any other town where there are dealers located, and not only do the dealers know the price that is being quoted, but you will find that a great many consumers who purchase from the dealers are also familiar with the lowest market price being quoted in that market." (Tr. 23168-69)

Brobston, President of Hercules, testified:

> "• • • ordinarily everybody knows what the prices are unless there is some change." (Tr. 26079)
>
> "• • • the dealers are just as familiar with the prices as the salesmen are. There is no secret about the prices." (Tr. 26080)

Affleck, former President of Universal Atlas testified:

> "• • • for many years, cement prices have been practically broadcast. Dealers all know that. They know there is nothing confidential about a cement price • • • it is generally understood throughout the

country, cement prices are open and published, and nothing secret about them, so that the information concerning price is passed very freely between customers." (Tr. 34857)

Elcock, Vice President of Southern States, testified that:

> "Everybody in any given town acquainted with the industry at all knows what the competition is there. Everybody knows the price of cement at any point." (Tr. 37503-04)

Answering an FTC questionnaire in 1931 Hawkeye said:

> "Open quotations of cement manufacturers are almost public property.* * *" (Com. Ex. 3142 C, D)

Stephen Duffy, for thirty-five years President of J. P. Duffy & Co., a company dealing in building materials, produced as a Commission witness,[2] testified that he doubted it would be possible for any cement manufacturer to sell cement in Brooklyn without it being general knowledge as to what the prices and conditions and terms of sale were, and that he would expect that to become public knowledge very quickly.[3]

James McCracken, Manager of the American Builders Supply Company since 1925, asked how closely he kept in touch with the price of cement in Louisville testified:

> "Of course, we keep very close touch with it. If anybody comes in, any cement salesmen, we ask him if there has been any change in the price, if he knows of any change in the price, and discuss it with him every time he comes in. I mean, we have to know what the price of cement is at all times.
>
> Trial Examiner Norwood: You receive those prices through these circulars and through the salesmen; is that right?
>
> The Witness: Yes, sir." (Tr. 36741-42)

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[2] (C) Tr. 7892.

[3] (C) Tr. 7923.

Numerous other witnesses testified that cement dealers are familiar and well informed as to cement prices[4] and there is no evidence to the contrary.

As found by the Commission,[5] the respondents learn of existing prices in the areas where they sell and of changes in such prices through their sales force and from common customers. This is termed "picking up prices in the field".[6] Each seller has a number of salesmen who, under

[4] Scott, H. M., President, Keystone (R) Tr. 27567.
Bates, J. E., Sales Manager, Federal (R) Tr. 30565.
Warren, F. B., Vice President, Bessemer (R) Tr. 32097.
Russell, Vice President, Peerless (R) Tr. 34428.
Letzkus, Sales Manager, Pittsburgh (R) Tr. 37689.
Robeson, Vice President, Nazareth (R) Tr. 28022-23.
Manley, General Manager, Hawkeye (R) Tr. 41615.
Horner, President, Kosmos (R) Tr. 36807.
Dawson, Vice President, Medusa (R) Tr. 40045.
Alexander, President, Missouri (R) Tr. 37120.
Browder, Traffic Manager, Penn-Dixie (R) Tr. 38146.
Lucas, Vice President, Petoskey (R) Tr. 38743. The foregoing testimony by Lucas was adopted by Georgia, Giant, Standard, Utah & Vulcanite.

[5] Fdgs., Par. 9(e).

[6] Alpha: Coogan, Vice President (R) Tr. 23058-59.
Arkansas: Thompson, Sales Manager (R) Tr. 46497-98.
Bessemer: Warren, F. B., Vice President (R) Tr. 32101-02.
Coplay: Twamley, Vice President (C) Tr. 6751.
Dewey: Tyler, President (C) Tr. 12666-68.
Green Bag, W. Va.: Wood, General Manager (R) Tr. 29515.
Kosmos: Horner, President (R) Tr. 36807-08.
Lone Star: Hogan, President (R) Tr. 34638-39.
Medusa: Dawson, Vice President (R) Tr. 40540.
Missouri: Alexander, President (R) Tr. 37118.
Nebraska: Hoenig, Sales Manager (R) Tr. 42064.
North American: Porter, President (R) Tr. 33819, 33895-96.
Northwestern States: MacDonald, B. A., Vice President (R) Tr. 36480-81.
Penn-Dixie: Browder, Traffic Manager (R) Tr. 38146-47.
Pittsburgh: Letzkus, Sales Manager (R) Tr. 37688-89.

standing instructions, constantly keep the company informed of prices at which cement is being quoted and sold to customers at the various destinations in the entire area where the company markets cement.[7]

Southern States: Eldcock, Vice President (R) Tr. 37503-04.
Southwestern: Warren, G. E., Vice President (R) Tr. 28763.
Universal Atlas: Affleck, President (R) Tr. 34856.
Stone, Vice President (R) Tr. 35087-88.
Volunteer: Roberts, Traffic Manager (R) Tr. 31713.
Wolverine: Nelson, J. L., Vice President (R) Tr. 35899.
And see all other footnotes in this Section.

[7] Aetna: Calvin, President (R) Tr. 30018-19, 30048.
Resp. Exs. 1997 A-G, 2002 B, 2003 A-Q, 2004 A-B, D-E, 2005 A-Z, 2006 A-K, 2007 A-V, 2008 A-Z, 2010 A-M, 2012 A-N: Sales memos and quotations.

Alpha: Coogan, Vice President (R) Tr. 23163-64, 23167-69, 23059, 23179-80, 23203-04; Resp. Ex. 3744: Coogan testimony before Wheeler Committee.

Bessemer: Warren, F. B., Vice President (R) Tr. 32353-54, 32337.
Dankel, Sales Manager (C) Tr. 11349-50.
Resp. Exs. 2336, 2337 A-G: Interoffice memos and quotations.

Consolidated: Storey, President (R) Tr. 47587-88.
Coplay: Twamley, Vice President (C) Tr. 6751.
Cumberland: Pearson, Secretary-Treasurer (R) Tr. 39851-53.
Dewey: Bass, Attorney-Examiner, F.T.C. (C) Tr. 13455-56: reporting interview with Tyler.
Tyler, President (C) Tr. 14283.
Moore, R. W., Vice President (R) Tr. 46986-87.
Resp. Ex. 3640 A, T, Z-2: Sales memos and letters.

Diamond: Com. Ex. 971-13 L: Answer to Burns & Clark questionnaire.
Edison: Sweeney, Vice President (R) Tr. 35039, 35818.
Federal: Bates, J. E., Sales Manager (R) Tr. 30547, 30550-51, 30552-54, 30811-12.
Florida: Storey, Vice President (R) Tr. 47587-88.
Georgia: Adopted Tr. 38742-43.
Giant: Adopted Tr. 38742-43.
Glens Falls: Titsworth, President (R) Tr. 47891, 47917.

Green Bag, W. Va.: Wood, General Manager (R) Tr. 29407.
Hawkeye: Manley, General Manager (R) Tr. 41611-12, 41614-16.
Royal, Attorney, F.T.C. (C) Tr. 19611-15: reporting interview with Condon, President of Hawkeye.
Resp. Ex. 3394 A-Z31: Sales memos and quotations.
Hercules: Brobston, President (R) Tr. 26102; (C) Tr. 26079.
Hermitage: McGovern, Sales Manager (R) Tr. 36125, 36126, 36343.
Huron: Meyers, Traffic Manager (R) Tr. 33376-77.
Keystone: Scott, H. M., President (R) Tr. 27376, 27495.
Kosmos: Horner, President (R) Tr. 36806-10.
Lawrence: Ackerman, Vice President (R) Tr. 31202-05, 31224-27, 31316-17.
Lehigh: Resp. Exs. 1131-36, 1143-46, 1150, 1153, 1158-61, 1164-67, 1169, 1174, 1176-78, 1180-82, 1191, 1198, 1200, 1203, 1205, 1206-08, 1211-12, 1215-18, 1224, 1226-27, 1229, 1231, 1238-41, 1246, 1250, 1251 A-E, 1252, 1281, 1286, 1289-94, 1296-98: Sales memos, telegrams and quotations.
Lone Star: Koch, Vice President (R) Tr. 32771, 33266-67.
Medusa: Dawson, Vice President (R) Tr. 40631-32, 40516, 40042.
Missouri: Alexander, President (R) Tr. 37118-19.
Monarch: Brooke, Vice President (R) Tr. 42190.
National: Dannelly, Vice President (R) Tr. 39628, 39619-21.
Nazareth: Robeson, Vice President (R) Tr. 28006-07, 28164-65, 28383-84.
North American: Porter, President (R) Tr. 33819, 33895-96.
Northwestern States: MacDonald, B. A., Vice President (R) Tr. 36480-81, 36636-37.
Peerless: Russell, Vice President (R) Tr. 34335, 34462-63.
Penn-Dixie: Browder, Traffic Manager (R) Tr. 38145-47.
Petoskey: Lucas, Vice President (R) Tr. 38742-43, 38821, 38749.
Pittsburgh: Letzkus, Sales Manager (R) Tr. 37688-89.
Resp. Ex. 2864 A-P: Sales memos and quotations.
Signal Mountain: Storey, Vice President (R) Tr. 47587-88.
Southwestern (Osborn): Warren, G. E., Vice President (R) Tr. 28763, 28820-21.
(Osborn) Apt, Traffic Manager (R) Tr. 39446.
Resp. Exs. 1645-1668: Sales memos and quotations.
(El Paso) Blair, W. R., Sales Manager (R) Tr. 38945-46.
Southern States: Elcock, Vice President (R) Tr. 37503-04.
Standard: Adopted Tr. 38742-43.

The Trial Examiner questioned Harry Koch, Lone Star Vice President on this subject as follows:

> "Trial Examiner Norwood: You testified in regard to prices, and I want to clear up one thing in that connection.
>
> How do you receive information of competitors' prices?
>
> The Witness: In the field, I adopt the methods I have noted, and that others have described. I have used some other methods when I was in the field, by getting a dealer to call up a manufacturer, without the manufacturer's knowledge of why the dealer was calling.
>
> Trial Examiner Norwood: You rely upon your salesmen and the dealers?
>
> The Witness: Yes.
>
> Trial Examiner Norwood: And dealers often report?
>
> The Witness: Oh, my, they might call you on a Sunday.
>
> Trial Examiner Norwood: Well, in the case of a price raise, would they quote that, too?
>
> The Witness: Not as quickly, sometimes, as on the decline, but they do ask you what is going on in the market, and you say, 'Well, what have you on your mind?' 'Well, we received a quotation from so and so,' and he tells you." (Tr. 33266-67)

Literally hundreds of quotations by competitors picked up from dealers in the field by salesmen and sent in to their

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Superior: Davis, President (R) Tr. 29590-91.
Trinity: Storey, Vice President (R) Tr. 47587-88.
Universal Atlas: Affleck, President (R) Tr. 34855-56.
Stone, Vice President (C) Tr. 484-91.
Reiter, Vice President (C) Tr. 4036.
Utah: Adopted Tr. 38742-43.
Volunteer: Roberts, Traffic Manager (R) Tr. 31713-15.
Vulcanite: Adopted Tr. 38742-43.
West Penn: McKee, Vice President (R) Tr. 27697, 27884.
Whitehall: Resp. Ex. 1623 A-D: Quotations.
Wolverine: Nelson, J. L., Vice President (R) Tr. 35899-900.

home offices are in evidence and hundreds of others were rejected by the Trial Examiner as cumulative and superfluous.[8] Changes in prices are also reported to respondents by their salesmen and customers by telephone and telegraph.[9]

c. Price Records Used by Producers

As a matter of long practice respondent companies keep their own individual record, in the form of price books, price cards or price lists, of their current price for cement

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[8] As an example see Resp. Exs. 1134-1135, 1143, 1150, 1153, 1160, 1174, 1205, 1218, 1238, 1246, 1250, 1251 A-E, 1252, 1286, 1291, 1294: Sales memos and competitors' quotations picked up in the field by Lehigh. For rejections by Trial Examiner, see *e.g.*, Tr. 30556-58, 34342.

[9] Bates, J. E., Sales Manager, Federal (R) Tr. 30550-58.
Scott, President, Keystone (R) Tr. 27376, 27495.
Russell, Vice President, Peerless (R) Tr. 34335, 34462-63.
Warren, G. E., Vice President, Southwestern (R) Tr. 28763.
Davis, President, Superior (R) Tr. 29590-91.
Roberts, Traffic Manager, Volunteer (R) Tr. 31713-14.
Pearson, Secretary-Treasurer, Cumberland (R) Tr. 39851-52.
Manley, General Manager, Hawkeye (R) Tr. 41616.
Horner, President, Kosmos (R) Tr. 36806-08.
Alexander, President, Missouri (R) Tr. 37119.
MacDonald, Vice President, Northwestern States (R) Tr. 36480-81.
Lucas, Vice President, Petoskey (R) Tr. 38742-43.
Coogan, Vice President, Alpha (R) Tr. 23196-97.
Letzkus, Sales Manager, Pittsburgh (R) Tr. 37688-89.
Duffy, S. V., Dealer (C) Tr. 7923.
McGovern, Sales Manager, Hermitage (R) Tr. 36343.
Calvin, President, Aetna (R) Tr. 30018, 30038.
Koch, Vice President, Lone Star (R) Tr. 32771, 33266-67.
McKee, Vice President, West Penn (R) Tr. 27697, 27936.
Dawson, Vice President, Medusa (R) Tr. 40043.
Blair, W. R., Sales Manager (El Paso), Southwestern (R) Tr. 38946.
Nelson, J. L., Vice President, Wolverine (R) Tr. 35899.

at each desination where they solicit business.[1] Executives of producing respondents testified that these current price

[1] Aetna: Calvin, President (R) Tr. 30041.
Resp. Ex. 1999 A-I.

Alpha: Coogan, Vice President (R) Tr. 23161-64, 23167-68, 23179-80, 23203-04, 23058-59.
Postelle, Sales Manager (R) Tr. 25044-45.
Resp. Exs. 819, 953 A-B, 954 A-B, 960 A-B, 968 A-B, 970 A-B, 971 A-B, 972, 973, 977 A-B, 979, 981 A-B: Price cards.

Ash Grove: Johnston, Investigator, WPA (C) Tr. 17543-44: reporting interview with Sunderland.

Cumberland: Pearson, Secretary-Treasurer (R) Tr. 39852-53.

Dewey: Moore, R. W., Vice President (R) Tr. 46729, 46921-22.
Resp. Exs. 3621 A-H, 3622 A-U, 3645 A-H.

Edison: Cloos, Vice President (C) Tr. 7557.
Resp. Exs. 2546-2552 for id., 2553.

Federal: Bates, J. E., Sales Manager (R) Tr. 30556-59, 30565, 30569-70; Resp. Exs. 2086, 3087 A-B, 2090 A-B.

Hawkeye: Resp. Ex. 3379 A-C: Price book sheets.
Resp. Exs. 3376 A-B, 3377 A-G, 3378 A-D, 3406 A-B for id.: Price book sheets.

Hercules: Brobston, President (R) Tr. 26080-81, 26102, (C) Tr. 16596.

Hermitage: McGovern, Sales Manager (R) Tr. 36127, 36366.
Resp. Ex. 2710: Price card.
Resp. Ex. 2651 A-L for id.

Huron: Meyers, Traffic Manager (R) Tr. 33377-448.

Keystone: Scott, H. M., President (R) Tr. 27495-96.
Resp. Ex. 1384.

Kosmos: Horner, President (R) Tr. 36813-14.

Lawrence: Resp. Exs. 2185 A-D, 2186 A-D for id.: Price cards.

Lehigh: Bowen, Vice President (R) Tr. 26657-58.
Resp. Exs. 1110 A-C, 1111 A-C, 1112 A-B.

Lone Star: Lehaney, Vice President (C) Tr. 14448, 14450.
Resp. Ex. 2378 A-B.

Medusa: Dawson, Vice President (R) Tr. 40064.

National: Dannelly, Vice President (R) Tr. 39698-99.
Resp. Ex. 3049 for id.

Nazareth: Robeson, Vice President (R) Tr. 28020-21, 28377.

records are used by them to quote commercial prices and invoice customers until they change their own prices or learn that some change in prices has been initiated by a competitor.[2]

Nebraska: Hoenig, Sales Manager (R) Tr. 42007.
Northwestern States: MacDonald, B. A., Vice President (R) Tr. 36580-81.
Resp. Ex. 2720 A-Z - 28 for id.
Oklahoma: Thompson, Sales Manager (R) Tr. 46484-86.
Peerless: Russell, Vice President (R) Tr. 34339.
Penn-Dixie: Browder, Traffic Manager (R) Tr. 38267, 38269.
Resp. Ex. 2909 D-O.
Petoskey: Lucas, Vice President (R) Tr. 38749.
Southern States: Elcock, Vice President (R) Tr. 37507.
Southwestern: Warren, G. E., Vice President (Osborn) (R) Tr. 28776.
Resp. Ex. 1641 A-B.
Blair, W. R., Sales Manager (El Paso) (R) Tr. 38953.
Volunteer: Roberts, Traffic Manager (R) Tr. 31719-20.
Resp. Exs. 2219-2220.
West Penn: McKee, Vice President (R) Tr. 27878.
Whitehall: Elliott, Vice President (R) Tr. 28515.
Wolverine: Nelson, J. L., Vice President (R) Tr. 35985-86.
Resp. Ex. 2630.

[2] Alpha: Postelle, Sales Manager (R) Tr. 25044-45.
Arkansas: Thompson, Sales Manager (R) Tr. 46500.
Consolidated: Storey, President (R) Tr. 47588.
Cumberland: Pearson, Secretary-Treasurer, Stip. Tr. 39852-53.
Florida: Storey, Vice President (R) Tr. 47588.
Hermitage: McGovern, Sales Manager (R) Tr. 36371-72.
Keystone: Scott, H. M., President (R) Tr. 27495-96.
Missouri: Alexander, President (R) Tr. 37353.
Resp. Exs. 2811-2815 for id.
Nazareth: Robeson, Vice President (R) Tr. 28020-21.
Nebraska: Hoenig, Sales Manager (R) Tr. 42007.
Oklahoma: Thompson, Sales Manager (R) Tr. 46500: Used price book to fix prices filed during code.
Signal Mt.: Storey, Vice President (R) Tr. 47588.
Southern States: Elcock, Vice President (R) Tr. 37507.

Ackerman, Lawrence Vice President, was cross examined as to this by Commission Counsel:

> "Q. Don't adopt my language. I don't want you to do that. I want to hear it from you, but I do want to get the facts straight as to how you determine the price that you will use at a destination point and at all the destination points at which you sell cement. Now, can you tell me briefly and concisely, or must I ask you a number of questions? A. We determine our price at a destination based on what we believe the market is at that destination; that is how we arrive at our price, except in cases where we ourselves have taken, you might say, the initiative and established a new price at a destination." (Tr. 31308)

(Most companies also keep their own record of base prices at their own and other mills which are reflected by delivered prices in their sales area.)

d. Exchange of Price Information

Testimony by respondents' executives is that they have no source of price information other than their salesmen and customers;[1] that they do not send their price quotations to nor otherwise notify their competitors of their

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Southwestern (Osborn): Warren, G. E., Vice President (R) Tr. 28781.
Trinity: Storey, Vice President (R) Tr. 47588.
Volunteer: Roberts, Traffic Manager (R) Tr. 31878, 31886, 31901, 31905.
Wolverine: Nelson, J. L., Vice President (R) Tr. 35985-86.

[1] Hawkeye: Manley, General Manager (R) Tr. 41616.
Lone Star: Koch, Vice President (R) Tr. 32772.
Missouri: Alexander, President (R) Tr. 37119.
National: Dannelly, Vice President (R) Tr. 39640-41.
Peerless: Russell, Vice President (R) Tr. 34335.
Penn-Dixie: Browder, Traffic Manager (R) Tr. 38146, 38219.
Volunteer: Roberts, Traffic Manager (R) Tr. 31713-14.

prices;[2] and that they do not receive price quotations or other price information from any competitor.[3]

As found by the Commission there have been only "limited direct exchanges among respondents of basing point prices or changes in such prices" and these were not under

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[2] Diamond: Raff, President (R) Tr. 47758.
Federal: Bates, J. E., Sales Manager (R) Tr. 30588.
Georgia: Tr. 38703 (adopted Tr. 48101-02).
Giant: Tr. 38703 (adopted Tr. 48103-04).
Hawkeye: Manley, General Manager (R) Tr. 41617.
Kosmos: Horner, President (R) Tr. 36921.
Missouri: Alexander, President (R) Tr. 37123.
North American: Porter, President (R) Tr. 33870-71.
Peerless: Russell, Vice President (R) Tr. 34335, 34339.
Petoskey: Lucas, Vice President (R) Tr. 38703, 38747.
Pittsburgh: Letzkus, Sales Manager (R) Tr. 37693.
Standard: Tr. 38703 (adopted Tr. 48105-06).
Utah: Tr. 38703 (adopted Tr. 48105).
Vulcanite: Tr. 38703 (adopted Tr. 48106-07).
Wolverine: Nelson, J. L., Vice President (R) Tr. 35904.

[3] Alpha: Coogan, Vice President (R) Tr. 23993.
Bessemer: Warren, F. B., Vice President (R) Tr. 32350.
Diamond: Raff, President (R) Tr. 47758.
McKeag, Attorney-Examiner, F.T.C., quoting Raff (C) Tr. 12257.
Federal: Bates, J. E., Sales Manager (R) Tr. 30588.
Glens Falls: Titsworth, President (R) Tr. 47900.
Hawkeye: Manley, General Manager (R) Tr. 41617.
Hercules: Brobston, President (R) Tr. 26082.
Lawrence: Ackerman, Vice President (R) Tr. 31228.
Medusa: Dawson, Vice President (R) Tr. 40044, 40539-40.
Missouri: Alexander, President (R) Tr. 37123.
Nebraska: Hoenig, Sales Manager (R) Tr. 42007, 42064.
Petoskey: Lucas, Vice President (R) Tr. 38747.
Pittsburgh: Letzkus, Sales Manager (R) Tr. 37693.
Southwestern (Osborn mill): Warren, G. E., Vice President (R) Tr. 28810;
Apt, Traffic Manager (R) Tr. 39446.
Universal Atlas: Affleck, President (R) Tr. 34856.
West Penn: McKee, Vice President (R) Tr. 27699.
Wolverine: Nelson, J. L., Vice President (R) Tr. 35904.

the auspices of the Institute and have not been "systematic".[4]

There was a substantial body of testimony by respondents' executives that there is no arrangement whereby information regarding bases or base prices is disseminated between them, and that lists of base prices are not distributed to competitors.[5] A few companies have furnished a

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[4] See Fdgs., Par. 9(e). NRA Open price filing is covered in Part III, C, *infra*.

[5] The details regarding the use of basing points, base prices and base price lists are discussed in Section D, *infra*, beginning at p. 335. See also Part V, G (Freight Rate Books), *infra*.

Alpha: Coogan, Vice President (R) Tr. 24598, 23156-57; Fellows, Sales Manager (R) Tr. 25683, 25728.
Arkansas: Thompson, Sales Manager (R) Tr. 46499.
Bessemer: Warren, F. B., Vice President (R) Tr. 32338.
Cumberland: Pearson, Secretary-Treasurer (R) Tr. 39833.
Federal: Bates, J. E., Sales Manager (R) Tr. 30584-85.
Green Bag, W. Va.: Wood, General Manager (R) Tr. 29513, 29516.
Hawkeye: Manley, General Manager (R) Tr. 41617.
Keystone: Scott, H. M., President (R) Tr. 27519.
Kosmos: Horner, President (R) Tr. 37053-54, 36924.
Lehigh: Bowen, Vice President (R) Tr. 26655.
Lone Star: Koch, Vice President (R) Tr. 32825.
Medusa: Dawson, Vice President (R) Tr. 40051.
Missouri: Alexander, President (R) Tr. 37123, 37310.
Monarch: Brooke, Vice President (R) Tr. 42292-93, 42192.
Northwestern States: MacDonald, B. A., Vice President (R) Tr. 36483.
Oklahoma: Thompson, Sales Manager (R) Tr. 46499.
Penn-Dixie: Browder, Traffic Manager (R) Tr. 38219-20, 38145.
Petoskey: Lucas, Vice President (R) Tr. 38703.
Pittsburgh: Letzkus, Sales Manager (R) Tr. 37815-16.
Southwestern (Osborn): Warren, G. E., Vice President (R) Tr. 28764-65, 28769, 28800-01, 28009;
(El Paso) Blair, W. R., Sales Manager (R) Tr. 38866, 38948.
Universal Atlas: Reiter, Vice President (C) Tr. 17149, 17151-52.
Volunteer: Parsons, Sales Manager (C) Tr. 5131.
West Penn: McKee, Vice President (R) Tr. 27862.
Whitehall: Elliott, Vice President (R) Tr. 28519.
Wolverine: Nelson, J. L., Vice President (R) Tr. 35981.

list of the current base prices they are using to a competitor upon request, however, and in a few instances lists of base prices of one company were found in the files of a competitor or competitors.[6]

All of the evidence showing or indicating transmission of commercial price information between competitor companies which is not set out elsewhere in connection with specific subjects is referred to below.

In December, 1936 the Lehigh company established new and lower prices throughout metropolitan New York, Boston and portions of New England by broadcasting quotations to its customers at all destinations affected.[7] At the same time, the company issued to its sales force printed lists of the new prices thus established. Lehigh's Vice President, Bowen, testified that they did not distribute this list of prices to competitors and added:

> "We sent our quotations to the trade. The quotations were effective immediately because they involved reductions in prices.
>
> After the quotations were in the field if we were asked by any dealer or competitor for a list of prices we had quoted, we gave them to them.
>
> Q. What I mean, what I am really getting at is, did you furnish them to any competitor prior to the effective date of the price? A. No, sir." (Tr. 26969)

On cross examination he was examined as to this and as to the receipt from competitors of similar information:

> "Q. As a matter of fact, you did supply such lists to competitors after they became effective, didn't you? A. Yes, to anyone that asked me for them.

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[6] Cement Institute: Reiter, Manager (C) Tr. 3819-20.
Penn-Dixie: Wing, Vice President (C) Tr. 8083, 8085, 8099-100, 8186;
Com. Exs. 1186 A-D, 813 X-Y;
MacDonald, D. P., Attorney-Examiner, F.T.C. (C) Tr. 9811.

[7] Bowen, Vice President, Lehigh (R) Tr. 26967.

Q. Which ones asked you? A. Oh, I would judge that perhaps a dozen people asked me for them.

Q. Can you name some of them? A. Yes. I recall Mr. Robeson of the Nazareth Company, Lone Star Company, North America, Alpha, and——

Q. Universal Atlas? A. Yes, I think they did.

Q. Well, now, you supplied those arbitrary lists to those companies, including Lone Star. Didn't you get Lone Star's list of arbitrary prices in and around Washington, D. C., and Baltimore? A. Yes; I recall when the Lone Star made those prices. I asked them if they would mind giving me a list of them, and they readily agreed.

Q. Are there any other areas or any other companies that you obtained prices from your competitors in that same way? A. I think there is one occasion I secured a list of prices around Baltimore from the North American Company.

Q. How about the Florida arbitraries? A. I don't know of any Florida arbitrary that could answer that description. I found prices on Miami and, perhaps, Jacksonville, that didn't correspond with any base figures, but that's all that I recall there." (Tr. 27293-94)

Robeson, Vice President of Nazareth, testified that Nazareth found the Lehigh price reduction "in the field" on the morning of December 8th and "met it immediately". Continuing, he said:

"It so happened that day I remember full well,— I was not at my desk until pretty nearly the middle of the day. I had to make a stop at Easton, and my New York office called me on the phone and the office in Easton told me about it, and I told them to gather all the information they had on it, and I would be there around noon time; by the time I got to Nazareth at noon time they had accumulated quite a picture of it. I told them, of course, we would meet the quotations and so advised all of our dealers. (Tr. 28173-74)

• • •

Q. As to the remainder,—as to the information regarding the remainder of the Lehigh prices which you told us about that were put into effect at this time, how did you obtain that information? A. In that case I asked the Lehigh Company some time in the afternoon of the 8th, whether or not they had got data that would give me the entire picture. We could develop the entire picture step by step; it would just save us a lot of time in the field, and they told us they had, and if we could send somebody over to their office, to Allentown, they would give us a copy, which I did." (Tr. 28174-75)

His cross examination was as follows:

"Q. Mr. Robeson, when you obtained the Lehigh price list December 8, 1936, which is Commission's Exhibit 551-J to 3-M, I believe, did you understand those quotations would be effective until further notice? A. No, sir.

Q. What did you understand? A. Why, I understood that that was their current market price at those points.

Q. How long was that? Was it your understanding that they were effective just for the day? A. Well, I understood it was their current market price until they changed it again; yes, sir.

Q. Until they changed it? A. Yes, sir. (Tr. 28357-58)

• • •

Q. I am going to show you Commission's Exhibit 551-J, running through to 551-M, and ask you if that is a copy of one of the quotations which you secured from the Lehigh office? A. I do not recollect it, particularly.

Q. I call your attention, Mr. Robeson, to the fact that these were produced by you under subpoena duces tecum. A. I say I do not recollect it particularly, but if they were, we had them. I asked Lehigh for them; yes, sir.

Q. And would that be true as to each of the succeeding announcements of Lehigh during the period from December 8th, running up until the arbitraries

were withdrawn, and in the New York and Boston areas? A. Well, we would develop information in the field of any changes, and when we found there were changes in the field, Lehigh's price already having been effective in the field, I would not hesitate to ask them if they would give me the information. (Tr. 28358-59)

• • •

Q. Well, do you recall having secured from Lehigh's office the announcement of policy, which is Commission's Exhibit 551-N, running through several pages?

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A. Yes, I recall that.

Q. Do you recall getting it from the Lehigh office? A. Yes.

Q. And is the same true of the Commission's Exhibit 155-X, and running through several pages? A. If that was their change of December 9, 1936, yes, after their quotations were in the field I asked them for a copy.

Q. Did you continue to ask for copies from the Lehigh Company throughout that period? A. If I found changes in the field which indicated to me there was a change after the quotations were in the field, yes. I would ask them for a copy. (Tr. 28359-60)

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Q. What caused you to go to Lehigh Company and get their prices? A. The Lehigh prices were in the field. You only went there as a matter of convenience. I could check everything Lehigh did in the field, but I was away from my office that morning by reason of having stopped at Easton.

Q. It is to your advantage, is it not, as a manufacturer and distributor of cement, to have prices openly announced by your competitors? A. Why, I don't know whether there is any advantage particularly. We would develop the same information in our contact with our customers. You see, these customers of ours handle five or six different brands of cement, and we have to be continually meeting the

lowest price we have, or we just have to forego the business.

Q. You cannot meet something you don't know, can you? A. It would be just a matter of making the dealer show us what he had." (Tr. 28418-19)

Alpha's Vice President, Coogan, on cross examination testified on the same subject as follows:

"Q. When you have used such price lists and did not compile them from information picked up in the field, from what did you get them? A. We learned of the existence of such prices from our field reports and by various quotations which were sent in to us, telephone calls from our customers, and our salesmen, and after we found out who had those, on two occasions I asked that particular company what prices they were quoting at these various points, and they sent me a list of the prices they were quoting.

Q. Did you send out that list of reproductions of it to your salesmen? A. We sent him a list of prices which we were going to quote in his field.

Q. The same as those shown in the list you received? A. Why, sure. We met the lowest price and that was the lowest price we found, so we met it.

Q. You said that you did that on two occasions. What companies were they? A. The Lehigh Company on one occasion, and I think the North American Company around Baltimore on another.

Q. When did those—when were those occasions? A. Well, it was shortly after those prices had been published. Now, I imagine it was about '36, if I am not mistaken.

Q. Have you received from those competitors any changes that may have been made in such lists of arbitrary prices? A. I don't recall any changes in the list.

Q. Is there a list of arbitrary prices prevailing in towns near Washington, D. C.? A. Yes, sir; there is outside of Washington.

Q. Did you receive a list covering those prices from any competitor? A. I don't remember whether that was in the North American list or not. Baltimore was in my mind. I am not sure.

Q. What about Lone Star? Did they get out a list of arbitrary prices out of Washington? A. I have never gotten a list of prices from the Lone Star Company, so far as I know.

Q. In sending these lists of arbitrary prices at certain points to your salesmen, did you instruct them to quote those prices? A. Why, certainly. When we sent them the prices we told them to quote them.

Q. Has there been a list of arbitrary prices out of Boston, points served from Boston? A. Yes, sir; there were arbitrary prices in and about Boston.

Q. Where did you get lists covering such places? A. Why, I said I got that from the Lehigh Company. Now you understand, of course, that I could easily—I won't say easily, but I could gather up these prices with our own organization, if we wanted to take the time to do it, and instead of doing that I simply—after I found that the prices had been published, why, I simply asked for them.

Q. Some of these lists contained scores and scores of towns, didn't they, with prices for each town? A. They contained a number of towns but it was very—it would have been very easy to have picked them out. It would have taken longer, of course." (Tr. 24603-05)

John J. Porter, President of North American, testified as to his company's policy with respect to furnishing price information to competitors as follows:

"Q. Now, what is the practice of your company, Mr. Porter, as to announcing to your competitors any reductions or increases in price that your company might make? A. We don't make any such announcement or give out any such information in advance of the prices going out to our trade. After the prices had gone out to our trade, if anyone asks us anything about them, why, we have no objection to telling them. (Tr. 33870)

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Q. As to the practice in your company with respect to notifying your competitors about changes

in your prices; do you know whether or not there was any deviation from that practice in connection with these changes in prices around Baltimore? A. I feel sure there was not. Our policy is well understood by our executives. I know that I made no deviation, and I feel very sure that none of our executives would deviate from that. (Tr. 33870-71)

* * *

Q. * * * Now, did you understand me to refer there merely to the subsequent changes in your Baltimore prices, or did you understand me to include the initial change that you made in those Baltimore prices? A. I understood that to refer to all of the changes, including the original price change as well as the subsequent ones. (Tr. 33999-34000)

Cross examination:

Q. Mr. Porter, I show you your testimony beginning with questions and answers, line 19, page 33870, and line 17, page 33999, concerning your practice of notifying your competitors of the price changes. I will ask you to explain that so we will know whether or not it has been your practice to notify your competitors of price changes such as this one that occurred at Baltimore in December, 1936? A. You want me to explain my testimony further?

Q. Yes, so that—there appears to be an inconsistency in that testimony with that that you have just given, and I want to know whether or not there is an inconsistency or whether there just appears to be one. A. Well, Mr. MacIntyre, it is our policy not to notify our competitors in advance of making a price change. After we have made the change and quotations have been sent out to our customers, we then have no objection to giving a list of these prices or giving any information about those prices to any competitors who may ask for them. I do not handle those matters. The policy is well understood in our sales department and they are free to answer any inquiries that may come in without referring them to me. I have no personal knowledge that any inquiry—such inquiries were received and were an-

swered, but I tried to, and I think I did state clearly in the testimony that there might have been some inquiries and they might have been answered. I have no personal knowledge that that was the case.

Q. Well, you expect and receive similar treatment from your competitors, don't you? A. I don't know just how to answer that, and as a matter of fact, I don't know that I have any knowledge of the circumstances. I have no knowledge, myself, of our competitors' policies in that. It may be that our sales department know that certain competitors will give them information of that sort if they ask for it, but I don't have any knowledge about that.

Q. Well, can you account, except in the manner that you testified, for the fact that the Nazareth Cement Company had in its possession, and produced to the Federal Trade Commission under subpoena duces tecum this price list of yours, which is Commission's Exhibit 551-2-C and 2-D? A. No. I wouldn't know how to account for it in any other way.

Q. Except that you had sent it to them? A. I think undoubtedly that they asked for it and that we sent it to them.

Q. You sent it to them before you had withdrawn the prices from the Baltimore area? I understood you to say that you have not withdrawn them even to this day? A. Oh, no. I would suppose that this was sent to them while the prices were in effect. As a matter of fact, the prices are in effect today except for minor changes at some stations. (Tr. 34038-40)

* * * *

Q. Well, you do not wish to change the testimony you have previously given to Mr. Werle on that point; do you, Mr. Porter? A. No.

Trial Examiner Norwood: I want to get that clear. That refers to giving these prices to competitors. As I understand it, you testified that you do give customers notice of an advance or price change, do you not, and name the effective date?

The Witness: We give customers notice of a change in price and name an effective date, yes.

By Mr. MacIntyre:

Q. After notifying your customers in advance of an effective date, which I understand in the case of this change at Baltimore during December, 1936, took place on the 26th? A. Yes.

Q. And the effective date was the 28th? Do you recall? A. Yes, I think I remember that.

Q. So it is compatible with your policy to, after notifying your customers on the 26th of December, 1936, to give your competitors, if they ask for it, for the information, lists of the prices that you make effective on the 28th even though they ask for it on the 27th; is that correct? A. I have already testified that we did not notify our competitors about changes in prices before they were sent out to our customers. They have, therefore, no means of knowing what changes in prices we have made until they pick them up in the field. Now, if they should pick them up in the field on the 27th, and telephone in to us then and ask about them, I presume that our sales department would answer inquiries." (Tr. 34041-43)

F. L. Stone, Vice President of Universal Atlas, testified on cross-examination regarding exchange of such price information with competitors:

"Q. After you have made a change in your base price and sent out the announcements to the trade, would you have any objection, then, to telling your competitors that you had made the change and sent out the announcement? A. We have no occasion to do that. I think, if they asked us, I do not know that we would object, because there is nothing secret about our prices.

Q. After you—— A. After we have made it.

Q. After you had announced it and sent the announcement out. A. After we had announced it.

Q. You sometimes inquire from competitors after you pick up some of their quotations in the field, whether they have made the change indicated? A. I do not think we do it in order to get the information.

I have no doubt that if two cement men would meet on the street, and if one put in a price advance, there might be some remark made to him, or banter or otherwise made about it.

Q. Why is it not a quicker and more satisfactory method, and what is the objection to it; after the announcement has been made why can't you confirm it by inquiry of a competitor? A. Well, we simply don't do it.

Q. And you have not done it?

* * *

A. I don't recall any definite case of having done it.

Q. You have no objection to giving that information to a competitor after you have announced a change and sent out your announcements to the trade? A. No; I think not, but I do not want to give the impression that that is a practice. If a lot of them began asking us, calling up, we would begin to wonder why they wanted the information. In fact, we might talk it over amongst ourselves, and say, 'Here, what is going on? We better look into this.'

Q. Referring to Respondent's Exhibit 2502 B, where it says, 'Changes in arbitrary delivered prices at points in Connecticut, New Jersey, and New York,' and mentions 27 points adjacent to New York City, all points in Essex, Hudson, and Union Counties, and points in Bergen and Passaic Counties, on and south of a line drawn through Palisades Park, and several other towns, 123 other towns adjacent to New York City and 95 towns adjacent to New York City, in New York State, you do not mean to tell us that you had field information from all points that are referred to there, do you, on the date that you wrote it? A. Well, this Exhibit 2502 A is dated August 2, 1932. May I read it?

Q. Yes. A. (After examination of letter) I do not remember the circumstances surrounding this exhibit, which is almost 8 years old.

Q. My question is: You do not mean to tell us that you had field information from customers at all of those points where these arbitrary prices apply; do you? A. I do not know the details of the case, Mr. Wooden, that far back.

Q. Well, is it not a fact that you have received lists of arbitrary prices at times from competitors? A. I have seen that stated in this case.

Q. Has not your company received them? A. I have never received any, and I do not know, of my own knowledge, that we have received them. I assume that we have, from the testimony in the case.

Q. Does not your Mr. Stark receive lists of arbitrary prices at various points from the Lehigh Company? A. Whether he is the man who receives them, I do not know, but the Lehigh Company, as stated, I believe in the record, if my memory serves me right, did let competitors have them if they asked for them.

Q. Well, it is a fact, is it not, that field information about one arbitrary point, destination point, would not be a bit of help about other destination points? A. That is true, nor would one quotation which works under what you call the base point system be of any advantage to us with respect to a lot of other points. We would have to know many more than one point." (Tr. 35289-92)

Under a subpoena duces tecum served upon all respondents during the proceedings before the Commission, Alpha, Nazareth, Giant and Universal Atlas produced copies of Lehigh's December 1936 list of delivered prices and some of the correction sheets thereto subsequently issued.[8]

Under date of August 14, 1930 B. F. White, Sales Manager of Lone Star at New Orleans, wrote his New York office as follows:

"On July eighteenth, during my absence on vacation Mr. Tomlinson acknowledged receipt of your wire of the seventeenth, which read as follows:

"HAVE AUTHORIZED BIRMINGHAM MEET COMPETITIVE PRICES TWO FORTY FIVE CLOTH PENSACOLA TWO FORTYFIVE CLOTH MOBILE ADVISE MR. KOCH"

[8] Com. Exs. 551 J, 867 U-Y, 870-13 B-13 R, 922 B-3 G.

In the last paragraph of his letter, Mr. Tomlinson stated that——

> 'Without your authority, we will not make any change in our $2.32 price delivered at points on the Gulf Coast intermediate to the Mississippi—Alabama State Line.'

Hearing nothing from you to the contrary, we therefore, have maintained the $2.32 arbitrary price, and have quoted the seawall contractors, which project is coming up on September second, on this basis.

Our reason for writing you is due to the fact that in talking with Birmingham several days ago, they informed us that the Penn-Dixie Company had asked what price we were quoting on the Mississippi Coast, and if we were still maintaining the $2.32 arbitrary price, which we advised them we were doing.

Today we have a letter from the Birmingham Office asking just how we arrive at the $2.32 arbitrary price now existing between New Orleans and Pascagoula, which makes us wonder if there has been some confusion by our competitors in quoting that territory.

Will you please, therefore, advise us if we should maintain the arbitrary of $2.32 which has been in effect since the change of November 27, 1929." (Com. Ex. 1133)

There is no further evidence with respect to this incident.

Under date of February 13, 1930, W. J. Brown of Penn-Dixie wrote W. S. Wing, Sales Manager in a letter marked "Personal — No Copies Retained":

> "Just learned that Lone Star will not eliminate the new Ironton base in making prices at such points in Tennessee, North and South Carolina where it might make a delivered price. In other words, they will use it in those three states the same as any other base in case it makes price at any points, which is contrary to the general practice of all the other Southern mills and contrary to the understanding we had.

Learned these facts in conversation with Mr. Walker of Lone Star in Birmingham last night, but who is very careful to advise that the Birmingham office had not yet taken any such contracts and hoped to avoid them." (Com. Ex. 1189)

On April 7, 1936 Warner, Vice President of Colorado, wrote Rader, Vice President of Lehigh, at Chicago:

"We have at last secured the information requested in your letter of March 23rd, as indicated on the form chart enclosed.

As a matter of fact, many of their delivered prices were irregular and not exactly related to the $2.66 mill base which was thought to be in use. But as explained to Mr. Hughes by telephone yesterday, this is about the best information obtainable and we sincerely hope that it serves your purpose." (Com. Ex. 947-15 E)

[In 1915 correspondence between C. M. Moore of Colorado with W. E. Burke of Three Forks, an affiliated company, refers to price information obtained from Lehigh as follows:

"I should have written you much sooner regarding the outcome of my conference with the Lehigh people in Chicago, * * *

[Italicized part quoted in Fdgs. Par. Seven (l)]

From this date, our prices will be made f.o.b. point of delivery and the price including cost of sacks. The same to be due 30 days from date of invoice, and an allowance of 2¢ per bbl. will be made for cash received within ten days from the date of invoice.

Price to Apply Until Further Notice.

Use Irvin, Wash., as your basing point, and figure $1.50 per bbl., including cost of cloth sacks, f.o.b. that point. Add to this the amount of freight from Irvin to point of destination at rates shown in list

sent you by our Chicago friends, which you have no doubt received prior to this date. Should you find any error in those rates when checking them by your records, please notify me immediately. You understand the above price is to apply to all territory in Montana, except the eastern portion, where lower prices will obtain from eastern competition. I trust that it will not be necessary for you to make any quotations in to this eastern Montana or western North Dakota territory for the next day or two, when I will have a definite basis upon which to work. If, however, it is positively impossible to avoid making quotations, use your best judgment, and do not fear our Lehigh friends at least making any cut in prices, that have been obtaining in that territory. No deviation or exception to the above price will be considered in any instance, and any salesmen, or employee, deviating one iota, will be discharged at once. No excuse will be tolerated, and if we do not have salesmen at this time who can secure the business for us on the basis of prices given them, we will have to get salesmen who can. We will give every salesman, and every employe, every assistance possible and complete information, so that they may be thoroughly posted, and we will see that our prices are as low as our legitimate competitors are naming, but no lower if we know it, and on this basis we expect them to secure for us practically all of the business in our territory.

I will write you under personal cover, an explanation of the above stand, in detail, so that you may know exactly why we are so positive in our statements, but can assure you, that every one of them are iron-clad. In this you may know, I will refer to my recent visit to Chicago.

I will reply to your other communications tomorrow, and as stated above, I hope to have within the next two or three days a definite basis for basing prices in eastern Montana and western North Dakota." (Com. Ex. 3210 A-C)]

[Later in January of the same year Moore again wrote Burke as follows:

[Italicized part quoted in Fdgs. Par. Seven (l)]

"I have wired you the basis for quoting all of your territory, which is as follows:

$1.50 per bbl. f.o.b. Irvin	*$1.10)*	
$1.50 per bbl. f.o.b. LaSalle	*.90)*	*Pencil*
$1.50 per bbl. f.o.b. Mason City	*1.10)*	*Notation*
$1.10 per bbl. f.o.b. Iola	*.70)*	

Whichever figures lowest.

All of the above prices include the cost of cloth sacks, with the usual sack rule. The terms are 30 days net, or 2¢ per bbl. discount for cash within ten days. You understand that the above prices are dealers' prices, and where positively necessary to quote to others than dealers, add not less than five cents per bbl. to the above prices, and as much more as, you can get by way of protecting your dealers, and in that way they will stick closer to you.

You have no doubt received list of rates from Irvin, and I am preparing rates from all other basing points, which I hope to have entirely completed within the next few days. However, you, no doubt, have the correct rates in your office at this time. We want no business on any other terms, or prices, than the above, but want you and your salesmen to keep us thoroughly posted in every instance where you have any idea of any deviation from the above by our competitors. You need have no fear, whatever, of the Lehigh people taking any business except on this basis, as their Chicago office is now in complete charge of their Spokane factory, and will be responsible for every action of every one of their employes, and you may rest assured, that Mr. Brown, as well as all others, understands this perfectly. Mr. Gowan gave me his personal guarantee of this, and I in turn gave him my guarantee of our strict adherence to this. Of course, nothing has been said to the International people regarding this, as, in the first place, I have had no opportunity, and in the second place, our Chicago friends seem very certain, that the International people would not quote lower than that basis, as they claimed, that the cost at Irvin is fully if not more than $1.10.

What do you think of the advisability of seeing Mr. Berry regarding this matter? Of course, we want to work with them and will do nothing, whatever, against them, but we must realize that the Lehigh plant is our strongest competitor, and we must work in harmony with them and keep absolutely in the clear, keeping our business open and above board in every particular. I have not heard definitely whether Mr. Berry will remain this year with the International Company, but I believe from what information I have, that he will. You remember he stated to me, as no doubt he stated to you, that he would not go lower than any basis upon which he knew the Lehigh plant to be selling, which I hope is true. While on this subject I want to call your attention to the fact of not letting any one know, that any understanding, whatsoever, has been agreed upon, and especially never mention this to any of your customers, but simply say to them, that we have reasons to believe, that no lower prices will be named than those we are quoting, because we know the basis to be practically cost of manufacture, at basing points, and no exceedingly large profit can be made by the plants operating at those basing points. Please caution your salesmen particularly in this regard." (Com. Ex. 3209 A-B)]

Warner, Sales Manager of Colorado, who was a salesman under Moore in 1915, said the letters antedated his connection with the company.[9] Bowen, Lehigh Vice President, was examined on the subject by Commission counsel as follows:

"Q. I direct your attention in that connection to a portion of Commission's Exhibit 3209 A, which is a letter from Clark M. Moore, of the Colorado Portland Cement Company, to sales manager of the Three Forks Company, and in which he says, after instructing him to use Irving as a basing point, and giving him the base price, he says, 'You need have no fear whatever of the Lehigh people taking any

[9] (C) Tr. 20249, 20251.

business except on this basis as their Chicago office is now in complete charge of their Spokane factory, and will be responsible for every action of every one of their employees, and you may rest assured that Mr. Brown, as well as all others, understands this perfectly. Mr. Gauen gave me his personal guarantee of this, and I, in turn, gave him my guarantee of this strict adherence to this.'

Do you still say there was no agreement or understanding between the Lehigh Company and any of its competitors? A. Yes, I do. I do not know anything about what Mr. Gauen may or may not have told anyone, but I do not hesitate to say that from the first of January, 1913, it was the Lehigh Company's definite policy that under no circumstances would it sell a barrel of its cement at any other than its published quotations, whatever they might have been.

Q. Well, this was the published quotation and the base of another company, the International. A. If, as we were at that time operating at Metaline Falls, a new basing mill, making our prices such that we met the price issued by another mill, they, nevertheless, were our published prices, and they were the prices we observed.

Q. Well, you don't publish the base prices of other mills, do you? A. We publish only destination prices.

Q. Based upon the base prices of other mills; is that right? A. At the present time we operate all mills as basing points.

Q. Yes, but you sell, also, in the territory of other base mills, do you not, and recognize the base-point price in that territory? A. Where we sell in the territory of other mills we meet the destination prices as we find them.

Q. What has become of this Mr. Gauen who was in your Chicago office. A. Mr. Gauen left the Lehigh Company, as I recall it, in 1921. He thereafter engaged in several lines of business having no connection with cement, and then, some years ago, moved to London where he organized a cement company. When I last heard of him he was living in London, England." (Tr. 27174-75)

An interoffice memorandum of Universal Atlas in 1934 or 1935 indicates that it stopped quoting the Kansas City Southern Railway on the basis of Sugar Creek when it received "official notice" from Missouri "that Sugar Creek was not a base."[10]

In December 1935 Colorado received a price list from Riverside which showed reduced prices in Arizona.[11]

A letter in May 1929 from Clinton of Monolith—Midwest to the General Manager of Monolith, an affiliate at Los Angeles, refers to a talk Clinton had with Maxfield of Idaho which was about to go into production, regarding prices as follows:

> "Mr. Maxfield advised that he had rather promised local dealers around Pocatello that his mill base for Standard Cement would be about $2.35 though it might be lower than that and I urged as hard as possible that he was in a position comparable to Hanover Trident. I could see no reason for a mill base lower than $2.50.
>
> He would not commit himself definitely at that time but I am suggesting it a good policy to keep in touch with him and try as best you can for a mill base higher than he indicated as probable." (Com. Ex. 1202 C)

In June 1932 Capen of Dewey's Iowa office wrote to the Company's main office complaining of their failure to notify him that there had been changes in bases at Louisville and Superior, Nebraska and continued:

> "When we sent out our quotations they did not take this raised base into consideration, hence we were under the market at several places in Western Iowa. When Mr. Cabanis of the Northwestern

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[10] Com. Ex. 1939.

[11] Com. Ex. 947-14 Y: Letter, Warner of Colorado to Reiter of Trade Practice Committee.

States Portland Cement Company asked me if we were recognizing the new base price at Louisville, I did not know that a new one had been made." (Com. Ex. 2170)

Thompson, Sales Manager of Oklahoma, wrote his President in January 1931 regarding a reduction in Lehigh's Iowa base and added:

"* * * As soon as we heard of this, I called Mr. Brown on the telephone to verify the rumored reduction and was advised that the reduction was due to the fact that the Lone Star people cut the price on the Missouri letting of January 20 from 11 cents to 16 cents a barrel on 393,000 barrels. We sent out our quotation Saturday." (Com. Ex. 2256 A)

The Southern representative of Penn-Dixie writing his sales manager regarding prices in his area stated that he was "personally advised by Mr. Williams, Southern Sales Manager of the Atlas Company in Birmingham" that their Leeds base "was still $2.05 but that it meant nothing outside of Leeds, as all prices were based on Birmingham."[12]

In January 1931, the Lone Star Assistant Sales Manager at Norfolk wrote his New York office in part as follows:

"We have just received information from Mr. Ralph R. Riley that the Lehigh Company is quoting a price of $2.53 per barrel, gross in cloth, f.o.b. cars, Rosslyn, Virginia, arrived at by applying the Union Bridge of $2.11, plus a freight rate of 11¢ per hundred, equivalent to 42¢ per barrel, arriving at a delivered price of $2.53 under the Lehigh plan of quoting.

This information has been confirmed, I understand, with the Lehigh representative. We quote a price of $2.66 per barrel, gross in cloth, at Rosslyn, Virginia, and we understand other competitors,

[12] Com. Ex. 2855.

Medusa and Giant, have not extended the application of the Union Bridge base into Rosslyn, Virginia.

Rosslyn, as you probably recall, was included in the original Metropolitan grant of the District of Columbia. However, the rate from Union Bridge to Rosslyn is one-half cent per hundred pounds higher than the rate from Union Bridge to Washington, D. C., namely, 10½¢ per hundred pounds and 11¢ per hundred pounds respectively, which you will note results in a 2¢ higher price at Rosslyn than applies at Washington, using the Union Bridge base.

It would seem, therefore, that the Lehigh Company have applied $2.11 Union Bridge to include Rosslyn, and as far as we have been able to determine, other companies have not yet met the competitive condition." (Com. Ex. 1120 B)

4. Price Reductions and "Price Cuts"

a. Open Reductions in Prices

Dankel, Sales Manager of Bessemer, asked to distinguish between a change in price and a "deviation" testified:

"A. Well, a change in price is what I would term a general broadcast by any manufacturer to his trade showing a change in price.

Q. A general change of price? A. Yes.

Q. That is, over a considerable territory resulting from a change in basing point price? A. It may be one individual market; wherever he broadcasts those established forms that we run into and are sent in to us by our salesmen to give us an opportunity to ascertain the price that is being quoted by our competition.

Q. Now, how is that different, if it is different, from the definition that you have attached to the words 'deviation in price', such as you have used here this afternoon? A. Well, it is used in the sense, on a particular job we have a given price quoted which is a price that we had used from checking the broadcast quotations, and we found certain compa-

nies had on that particular job had a lower price quoted.

Q. You mean, then, a deviation? A. Without a general broadcast to the trade that is lower than——

Trial Examiner Norwood: Just one special transaction, is that the idea?

The Witness: Yes, your Honor. (Tr. 11354-56)

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By Mr. MacIntyre:

Q. A deviation from what? That is what I am attempting to have you to state now. A. From the general price level that has been prevailing in the market." (Tr. 11357)

G. E. Warren, Vice President of Southwestern at Osborn, Ohio, testified on the same subject as follows:

"Q. Mr. Warren, in your testimony you have repeatedly used the words 'price reduction.' What do you mean by the words 'price reduction'? A. Lowering of the destination price to a given point.

Q. Would you distinguish between the term 'price reduction' and 'price cutting', in your mind? A. I would say a price reduction is a lowering of the published or known price that anyone makes, whereas a price cut would mean to me that the man has reduced that public or published price simply to some one or more prospective buyer." (Tr. 28875)

Browder, Penn-Dixie Traffic Manager, explained the difference between price cuts and "published" prices as follows:

"Q. Mr. Browder, you have referred to prices of competitors which are less than the competitors' published prices for particular points. Now, what do you do in a case where a competitor lowers his price by sending out new quotations? A. We meet that price and send out our quotations, which are our published—what we call our published prices, and that will be simply having a price reduction, not a price cut." (Tr. 38482)

The evidence shows numerous open reductions in prices, sometimes spreading country-wide, sometimes limited to a single area, and sometimes at a single point or limited number of points. Such reductions have been initiated by 16 companies.[1] The evidence set out at pp. 204-212, *supra*, shows that competitors must meet reductions or forego the business.

b. Secret Price Cuts

Apart from open price reductions cement executives representing respondents which, taken as a whole, sell in

[1] Allentown: Coogan, Vice President, Alpha (R) Tr. 23856-57.

Alpha: Id., Tr. 23359-60, 23290-92, 23851.

Ash Grove: Sunderland, President (C) Tr. 13738.

Dewey: Moore, R. W., Vice President (R) Tr. 47144, 47169, 47174.

Huron: Meyers, Traffic Manager (R) Tr. 33418-19.
Rooney, Vice President (R) Tr. 33669.

Lawrence: Ackerman, Sales Manager (C) Tr. 7116.

Lehigh: Bowen, Vice President (R) Tr. 26676, 26956, 26970-73.

Lone Star: Com. Exs. 975-6 A, 1174; Resp. Ex. 457; Hogan, President (R) Tr. 33050.

Marquette: Colburn, Vice President (R) Tr. 40010-11.

Medusa: Dawson, Vice President (R) Tr. 40052, 40055, 40588.

Missouri: Alexander, President (R) Tr. 37289-90.

North American: Porter, President (R) Tr. 33795-96, 33808, 33794, 34035.

Penn-Dixie: Browder, Traffic Manager (R) Tr. 38299-301.

Volunteer: Parsons, Sales Manager (C) Tr. 5084.
Hanahan, President (R) Tr. 38634.

Wabash: Meyers, Traffic Manager, Huron (R) Tr. 33409.

Wolverine: Nelson, J. L., Vice President (R) Tr. 35907.

all areas east of the Rocky Mountains, testified that there is always secret price cutting.[1]

Koch, Vice President of Lone Star, testified:

> "A. Mr. Brick, I would say in my entire cement experience there never was a time when certain buyers and frequently many buyers, could not buy cement below the published or quoted price, save perhaps a short period during the NRA, and it was not a hundred percent then.
>
> Q. Well, now, with regard to deviations from published quotations to which you have referred in your last answer, did you find that such deviations applied only to one type of business, or to the customer trade generally? (Tr. 32763-64)
>
> • • • •
>
> A. In the earlier years of my experience, and until the larger types of work, especially highway work, came into existence, it existed with the dealer. Since then has existed more on the larger and the type of work that we sell direct than it does with the dealer, save the large dealer in the metropolitan center.
>
> *By Mr. Brick*:
>
> Q. And what was the situation with respect to him? A. Well, he always finds a way to beat the quoted price." (Tr. 32765)

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[1] Dewey: Moore, R. W., Vice President (R) Tr. 47206-07;
See Royal, F.T.C. Investigator reporting Tyler, President (C) Tr. 19622, 19624.
Hermitage: McGovern, Sales Manager (R) Tr. 36136.
Lone Star: Neylan, Asst. General Sales Manager (C) Tr. 6238, 6242;
Hogan, President (R) Tr. 34633;
Koch, Vice President (R) Tr. 32817-18, 33238-39.
Louisville: Hill, Vice President (C) Tr. 13296-97.
Missouri: Alexander, President (R) Tr. 37326-28.
Monarch: Brooke, Vice President (R) Tr. 42351-52.
Nebraska: Hoenig, Sales Manager (R) Tr. 42009.
Superior: Davis, President (R) Tr. 29591-94.
Cf. Fdgs., Par. 6(c).

F.T.C. Investigator Royal testified that he was told by Dewey's President Tyler that "sales were constantly made by companies at prices less than those which they publicly quoted"[2] and that "while quotations at any and all destinations might be practically uniform, there was price cutting when it came to actually making the sale."[3]

Hill, Vice President of the non-respondent, Louisville Cement Company, testified that "I find that they are cutting prices ever since I have been in the cement business and right up to date."[4] Hoenig, Nebraska Sales Manager testified that the prices appearing on Nebraska's printed quotations "merely serve generally as a pattern" and that Nebraska does not always adhere to them. And continuing: "In other words, they give a general idea of what the price is for the benefit of the dealer and the contractor, but competitive conditions in our territory have been worse, probably, than any other place in the United States, and for the last 15 years or so, and it has necessitated our meeting prices that were other than and below those that are published by our competitors,—at least some of them."[5]

McGovern, Hermitage Sales Manager, testified that he would not say it was "unusual" to find price cuts, but that it is "more or less frequent" since the company has been in operation.[6]

The Commission found that "in the depth of the economic depression in the early 1930's concessions were wide spread" (Par. Six (c)). Neylan of Lone Star testified that beginning about 1929 there was a period of "progressive", "fairly wide spread" reductions in prices.[7] Bowen of Lehigh characterized 1931 as a period of "price

[2] (C) Tr. 19622, 19624.

[3] (C) Tr. 19627.

[4] (C) Tr. 13296-97.

[5] (R) Tr. 42009.

[6] (R) Tr. 36136.

[7] (C) Tr. 6237-38.

war"[8] and Sunderland of Ash Grove described it as a period of "considerable price cutting."[9] This carried into 1933.[10] Hogan, Lone Star's President, testified that during most of 1932 competition was selling "at special prices all over the country."[11] He continued:

> "* * * Our company took that very seriously. We had been on a one-price policy for years; but after a great deal of discussion it was—finally it went clear to the Board of Directors and they authorized us to meet that competition. Not only meet it, but go out and get business. We not only went out to get business, but we went out to go below, if necessary.
>
> That extended through 1931 and into 1932, but by the middle of 1932, the price had gotten so low there wasn't anything left to cut." (Tr. 34651)

As to this period, Affleck, Universal Atlas' former President, testified:

> "Well, the most—the recent period of demoralization in the cement industry was in the period 1931 and two and three; 1930, to some extent, as I remember, but '31 and two, especially.
>
> Q. And what happened? A. Where it was just a general demoralization, and cement was sold at any price without much reference to—especially on the large lots, what few there were during that period.
>
> Q. Was that country-wide or located in certain places? A. I think it was pretty well country-wide. Worse in some areas than others, but pretty general, as shown by the financial return on—I don't think any companies were in the black for those two or three years or four years."[12]

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[8] (R) Tr. 26893.

[9] (C) Tr. 13582.

[10] Affleck, President, Universal Atlas (R) Tr. 34843.

[11] (R) Tr. 34651.

[12] (R) Tr. 34843.

Affleck was also asked to state the cause or causes as he saw them of these price conditions and he testified:

"A. In 1929 there was a visible falling off in the volume of business, and along with that falling off different companies desirous of maintaining their absolute volume of business instead of relative, began cutting prices and that price cutting practice in an effort to maintain individual companies' volume got worse and worse until the effect was what was indicated in that letter.

Q. By cutting prices do you mean that they quoted destination prices that were less than the sum, the lowest sum of mill base plus freight from mill base to destination? A. Yes.

Q. In other words—— A. (Continuing) The mill base, so called, plus freight was pretty much disregarded and the destination price was named, oh, more or less regardless of any base.

Q. In other words, the price cutting manifested itself in the disregard of the basing point system of quoting, did it not? A. Very largely, but the prices were quoted at destination, however. You know, the price was at destination——

Q. Yes. A. —even though there wasn't any reference or attention paid to how the price at destination was arrived at.

Q. It was cut below the—— A. Yes.

Q. —the regular destination price? A. Well, each fellow cut below what he thought somebody else was quoting. It was just a seesaw down until it got into bad shape.

Q. Can you name any particular companies that were active in that process of price cutting that you refer to? A. I don't think I can name any. Specifically, I would say they all did except we. I don't think we did any."[13]

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[13] (C) Tr. 13043-45. See also Bowen, Vice President, Lehigh (R) Tr. 26893-94:

"The immediate cause was, undoubtedly, a sharp falling off in demand for cement."

Koch, Vice President of Lone Star, testified that as a general rule Lone Star adheres to a one price policy, but that it had deviated from that on occasion. The first occasion in recent years was 1931 when Lone Star made price deviations in "all the territories" it covered.[14] He described the circumstances as follows:

> "A. Well, we were entering the so-called era of depression. We found business slipping away from us, by what we had reason to believe were methods that were not employed so generally, and it had reached a point of where we felt it affected our business more than we cared to have it affected.
>
> Q. Now, what was the principal reason, Mr. Koch, for losing the business? A. Well, reports, circumstantial evidence, and actual evidence, of lower prices made for the sale than were actually quoted in the field. By that, I mean the general quotations.
>
> Q. Well, how did you obtain your knowledge with regard to prices being quoted under published prices? A. We got photostatic evidence of invoices, checks, and——
>
> Q. And from whom, Mr. Koch, did you get the general information which you have talked about? A. From our field forces.
>
> Q. Did you find that only some or many of your competitors were selling cement at prices lower than their quoted prices? A. Well, there were too many. We might be patient with a few, but there were too many.
>
> Q. Would you say that the situation was general? In other words, tell us the extent to which you found competitors quoting under their published prices? A. Oh, yes, I would say that practically all the area that we covered, more in some than in others.
>
> Q. Now, did such prices—that is, those underquoted prices—apply to contractor business and dealer business? A. Generally to contractor business for highway work, or some particular work involving a fair quantity.

[14] (R) Tr. 32746-49.

Trial Examiner Norwood: What time was this?
The Witness: In 1931.
Trial Examiner Norwood: 1931?
The Witness: Yes.

By Mr. Brick:

Q. Did it continue beyond 1931, Mr. Koch? A. Well, yes—it continued beyond that for some time, and then it eased off, and then it came back again in 1938. (Tr. 32748-49)

* * *

Q. Did you find that your action in deviating from the policy of adhering to published quotations was successful or unsuccessful? A. Well, during 1931 it got us quite a volume of business, but as the practice became known others met it, and then we lost. From the dealer's standpoint, and those that we sell at dealer's prices, like Ready-Mix, and other concerns, we lost somewhat in favor by not extending the reduction to them." (Tr. 32752-53)

Commission counsel subsequently developed through Koch that in 1931 in the mid-west there was also a "good deal" of "open price cutting" when bids were made public.[15] Hogan testified that there was another price war period in 1937 during which time an "established price did not seem to exist" in Mississippi.[16]

Bowen described Lehigh's experience during 1931 as follows:

"A. During the latter part of 1930, and continuing into 1931, we found a great many cases where competitors were offering to sell, and selling, at prices lower than our prices, and lower than the published prices of those competitors. In other words, they were secret price concessions below competitors' published prices.

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[15] (R) Tr. 33238-39. As to lower prices on bids during the period, see Part IV, pp. , *infra*.

[16] (R) Tr. 34657.

Q. Well, what was the policy of the Lehigh Company, Mr. Bowen, with regard to making sales below its published quotations? A. Our policy was not to do so. For 20 years prior to that time we had been operating as a one-price—in a one-price policy, by which I mean that we published our quotations and sold in all cases only at those published quotations. We thought that that was the only sound open way to do business, and adhered to it.

Q. Now, how did it work out, in your experience? I mean, of course, was or was not Lehigh able to sell its product at its published quotations, in competition with these prices that you have mentioned? A. No. No. To a constantly increasing extent we found ourselves unable to sell and lost a great deal of business as a result of such quotations.

Q. And did you find whether or not the competitors gave the same secret prices to their entire trade?

Mr. Wooden: Your Honor, the last several questions have been open to the same objection that I now make to this one, and that is the witness could not know what was secret, and the extent of it, and the details regarding secrecy by reason of the very fact of secrecy.

By Mr. Leisure:

Q. Mr. Bowen, if there is any ambiguity as to the word 'secret,' I, of course, have reference to a difference between published quotations and prices actually made that came to your knowledge. (Tr. 26894-95)

A. Yes.

Trial Examiner Norwood: Now, I want you to give us any factual information that you might have as to any particular occasions that you can tell us about. Make your answer factual to that question, and I will overrule the objection; with that understanding.

A. I will say that we found a great many cases in which competitors were making sales at other than

their published quotations, and we found that they did not make the same price to all customers, but in some cases gave customers lower prices than the published quotations, while in other cases they did not give similar concessions.

By Mr. Leisure:

Q. Now, did the Lehigh Company endeavor to meet these secret prices where it had reason to believe they were being quoted to a customer to whom Lehigh was trying to sell its product? A. No, sir; we did not.

Q. What did you do, Mr. Bowen, to meet this price situation? A. During the latter part of 1930 and the early part of 1931 we found a tremendous increase in the number of situations such as I have described where we were unable to sell at our published prices because our competitors were offering our customers price concessions below their published prices. Because we were unable to meet those price concessions in individual cases but wanted to handle our business by open quotations, and in an open way, as we had in the past, we made a number of reductions in our prices, quoting prices on steadily reduced base figures at our mills; all in an effort to reach a level of prices at which we could sell.

These reductions in our prices brought them to very low levels; [portion of testimony stricken on motion by Commission counsel] * * * To some extent these successive steps enabled us to sell, but in a very large measure we found that secret price concessions still continued.

The reductions we had made, figuring on our own mills, had, as I said, brought our prices very much below cost. We were still, however, unable to sell our product in a great many instances.

At that time, still in an effort to arrive at prices which we could make openly and which we could sell at, we began in the spring of 1931 to quote prices which reflected base figures at some of the mills of our competitors from which we had found the greatest number of secret price concessions to emanate. In doing this the base figures were in no case lower

than the base figures of our nearest mills, nor were they lower than the base figures reflected by sales of substantial volumes of cement by those companies.

By and large our action was governed by two considerations: First, we had competition to meet and we had to meet it. Second, we wanted to make our prices open, to maintain those prices publicly, and to treat our customers all in the same manner so that we might hold the same reputation for fair and open dealing that we had tried to build up. (Tr. 26896-98)

• • •

Q. Mr. Bowen, to what extent, if any, did the lower base figures in your endeavor to meet these conditions? To what extent did you lower your base figures in your endeavor to meet the conditions which you found in the market?

• • •

A. I take it that you are referring to the base figures at our own mills. We had reduced those by 60 to 70 cents per barrel, bringing them at most mill locations below a dollar per barrel, and some as low as 80 cents, as I recall it.

Q. I see. Well, in reducing your base figures, did you reduce the price at points which were not seriously affected by the price cutting which you have mentioned? A. Yes, we did, and some of our base figures were sharply reduced. The effect was to reduce our destination prices over the whole area covered by that plant. In many cases a good portion of that area had not been as adversely affected by competitive price conditions as other portions of it. The effect was, of course, to reduce prices in some cases over a territory larger than what—larger than that in which we had discovered the price concessions.

Q. Why did you cover this large area, Mr. Bowen? A. Simply because we were making our price publicly and openly, and when we reduced our prices we reduced them to all of our customers in the territory concerned.

Q. Well, what was your experience with these reductions of your base figures,—were you able to get business in the territories where the price cutting existed? A. Only to a slight extent. We found that in many cases, in spite of our reductions, computed in our own mills, that secret price concessions continued, and we were unable to get the business in those cases at our published prices.

Q. Then, what happened, Mr. Bowen, by quoting your prices from a base at the mills of your competitors, what was accomplished? A. After that happened there was a gradual change in the situation, so that we began to get business. Prior to that action competitors were able to make prices in certain territories secretly and still obtain higher prices from the trade, either in the same market, perhaps, or in adjacent markets, but with our quotations made publicly those competitors very quickly found that they could no longer get business at varying prices, but must take the price covered by our published quotations.

As time went on we found that the secret price concessions gradually began to clear up and we did begin to get a considerable volume of business at our published prices.

Q. What was your experience? Could your competitors get more than your published prices? A. No, they could not.

Q. Did they continue to have prices less than your published prices? A. Oh, gradually, the number of such prices was reduced, and we found that our competitors were to a much greater extent adhering to their own published quotations." (Tr. 26902-04)

[For the connection between this evidence and the so-called imposition of "punitive cases" see Sec. D, 7, pp. 484 *et seq., infra.*]

As to the uniformity of cement prices during the 1930-1932 period, Affleck, former President of Universal Atlas testified as follows:

"Q. During this period of time, would you say there was a uniformity in price from the various

manufacturers when these prices were cut, or was there not? A. On the—the sequence of things would be about this: there would be cutting—secret cutting here and there to get this or that or the other particular piece of business. After that cutting had continued for a period of time, the actual prices became so far out of line with our price, say, plus freight, that we reduced our price base and that operation proceeded pretty much all over the country, until the—until the price base got away down. I forget how far.

Q. Well, when it got away down, were you selling at the same price as others, or at different prices? A. Well, when the price was down at a perfectly ruinous level, or figure, the tendency toward uniform delivered prices was exactly the same as when prices were higher, with the exception that, to some extent, the mill would not reach out as far, where his net would be perhaps less than his out of pocket cost. By out of pocket, I mean material and labor, disregarding overhead, taxes, and advertising, selling, all that sort of thing.

Trial Examiner Norwood: In other words, those prices were still uniform, but lower?

The Witness: Still uniform. Just as uniform, but practically at ruinously low level as high level.

By Mr. Hershberger:

Q. To what do you contribute that phenomenon, if it is a phenomenon, that those prices were uniform at a low level to the same extent as the high level? A. As I said before, nobody will pay more for cement than the price at which he can buy it. The customer practically makes the price uniform.

Q. In other words, you think the price—you think the customer makes the price uniform, rather than the method of selling makes price uniform? A. Yes." (Tr. 34846-47)

Evidence as to the following companies showed that they had indulged in price cutting in varying degrees:

Company	Witness and Title	Reference
Aetna	Calvin President	(R) Tr. 30173
Arkansas	Thompson Sales Manager	(R) Tr. 46493-96
Consolidated	Storey President	(R) Tr. 47611-14, 47588-91
Coplay	Twamley Vice President	(C) Tr. 6769-70
Cumberland	Pearson Secretary-Treasurer	(R) Tr. 39853
Dewey	Royal, F.T.C. Investigator, reporting Tyler President	(C) Tr. 19626, 19627
	Moore, R. W. Vice President	(R) Tr. 47149, 47203, 47212, 47205-08
	Capen Vice President	(C) Tr. 12694
Florida	Storey Vice President	(R) Tr. 47611-14, 47588-91
Glens Falls	Titsworth President	(R) Tr. 47895, 47899, 47900, 47940
Hawkeye	Manley General Manager	(R) Tr. 41782-93, 41836-38, 41841-52, 41936, 41940-41
Hermitage	McGovern Sales Manager	(R) Tr. 36135-38, 36360-61
Kosmos	Horner President	(R) Tr. 36817-18, 36853, 36808, 36859-60
Lone Star	Koch Vice President	(R) Tr. 32741, 32746-65, 32807-13, 32815-24
	Hogan President	(R) Tr. 34651, 34656-57
Marquette	Colburn Vice President	(R) Tr. 39946, 39955-57
	Wecker President	(C) Tr. 14005-06, 14076

Company	Witness and Title	Reference
edusa	Dawson Vice President	(R) Tr. 40063-64, 40520, 40061-62
issouri	Alexander President	(R) Tr. 37301-02 (O.P.), 37328-29, 37324-28, 37364, 37386-90, 37461-63
onarch	Brooke Vice President	(R) Tr. 42302, 42304, 42338, 42340-43, 42345-60, 42433-34
ational	Dannelly Vice President	(R) Tr. 39634-35, 39638-42
ebraska	Hoenig Sales Manager	(R) Tr. 42009-10
orthwestern tates	MacDonald, B. A. Vice President	(R) Tr. 36612-14, 36645-46, 36681-82, 36697-700, 36702
klahoma	Thompson Sales Manager	(R) Tr. 46493-96
eerless	Russell Vice President	(R) Tr. 34430, 34466-67
etoskey	Lucas Vice President	(R) Tr. 38752-54
ittsburgh	Letzkus Sales Manager	(R) Tr. 37704-07
Signal Mountain	Storey Vice President	(R) Tr. 47611-14, 47588-91
Southern States	Elcock Vice President	(R) Tr. 37510-13
Southwestern	Warren, G. E. Vice President (Osborn)	(R) Tr. 29317, 29325, 28875-76, 28883-84, 28888
Superior	Davis President	(R) Tr. 29591-94, 29616-17
	Moore, H. H. Secretary-Treasurer	(R) Tr. 29812
Trinity	Storey Vice President	(R) Tr. 47611-14, 47588-91
Wolverine	Nelson, J. L. Vice President	(R) Tr. 35915-16

Representatives of 26 companies testified that they found that their competitors were making sales at prices below their announced prices.[17]

As to whether or not price cutting was criticised, G. E. Warren, Vice President of Southwestern, testified:

> "Trial Examiner Norwood: Does the maker of these prices come in for a good deal of adverse criticism by his competitors when it is found out?
>
> • • •
>
> The Witness: I would know more about what his criticism is by his customers; I hear that.
>
> Trial Examiner Norwood: They would criticise him.
>
> The Witness: Yes." (Tr. 28876-77)

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[17] Aetna: Calvin, *supra*.
Coplay: Twamley, *supra*.
Cumberland: Pearson, *supra*.
Dewey: Tyler, *supra;* Moore, R. W., *supra*.
Edison: Sweeney, Vice President (R) Tr. 35856.
Glens Falls: Titsworth, *supra*.
Hercules: Brobston, President (R) Tr. 26099.
Hermitage: McGovern, *supra*.
Kosmos: Horner, *supra*.
Lehigh: Bowen, Vice President (R) Tr. 26615-16.
Lone Star: Koch, *supra*.
Louisville: Hill, Vice President (C) Tr. 13296-97.
Medusa: Dawson, *supra*.
Missouri: Alexander, *supra;* Tr. 37287-88, 37324-28.
Monarch: Brooke, *supra;* Tr. 42297.
National: Dannelly, *supra*.
Nebraska: Hoenig, *supra*.
Northwestern States: MacDonald, B. A., *supra*.
Peerless: Russell, *supra*.
Petoskey: Lucas, *supra*.
Pittsburgh: Letzkus, *supra*.
Southern States: Elcock, *supra*.
Southwestern: Warren, G. E., *supra;* Blair, W. R., *supra*.
Superior: Davis, *supra*.
West Penn: McKee, Vice President (R) Tr. 27715-16.
Wolverine: Nelson, *supra*.

c. Knowledge of Price Cuts

The evidence shows that price cuts seldom remain secret and the Trial Examiner stated:

> "You have offered evidence to show that those prices can't remain secret very long. Secrets always come out. And I don't think there is any testimony to controvert that up to this time." (Tr. 32820)

How they are discovered was described by Hoenig, Sales Manager of Nebraska, as follows:

> "We find out through the dealers,—if the dealers are involved, through the contractors, whom we cultivate very intensively, whom we regard as very good friends, so much so that they become confidential with us; sometimes we resort to methods that are used for checking purposes, such as making check offerings, testing the market with a price that we suspect is below the published price to see whether it appeals to the contractor, especially when that contractor has committed himself to us for all or part of the business and does not give it to us, which creates, as a result, a strong suspicion that he has a price. We resort to—we check it in every way that we possibly can, through the dealers, for example, on the evidence that they are able to secure on the jobs that they are trying to sell, checking along with us, with their competition. We have many different ways that satisfy us that there are secret prices, just the same as any circumstantial evidence in a case in court will satisfy a jury to that effect." (Tr. 42010)

Brooke, Vice President of Monarch, cited another means of knowledge:

> "All these things that bob up in different ways. They are made—sometimes there is a public letting of a thousand or two barrels in a town like Wichita, or Omaha, and the dealer will bid, oh, anywhere from a fraction of a cent under his cost, under what we consider his cost and published price, to one or two or three cents over it, and if that condition con-

tinues we finally come to the conclusion that he is not paying the market, and we have on occasions just gone in and said to another dealer, 'Bid this, and so and so, and invoice it at the price that we have given you.' " (Tr. 42351)

On this subject J. L. Nelson, Vice President of Wolverine, testified:

"There may be secret price concessions which some of my competitors have made which I do not know about, but I have found that under normal circumstances a friendly dealer or contractor customer of the Wolverine Company will tell our salesman or tell me in the event that he has secured a special concession from one of our competitors, and will give us the opportunity to meet such concessions." (Tr. 35915-16)

The Trial Examiner developed this further with the witness McGovern, Sales Manager of Hermitage, as follows:

"Trial Examiner Norwood: Now, if a competitor made a secret price to a dealer, wouldn't he report that to you right away?

The Witness: If he was getting an advantage?

Trial Examiner Norwood: Yes.

The Witness: Why should he tell me, your Honor? He wants to keep on getting that advantage.

Trial Examiner Norwood: Well, suppose he gets an advantage in a printed circular.

The Witness: Well, of course——

Trial Examiner Norwood: Does he report that immediately?

The Witness: Well, here is the thing: If you were going to give a dealer a secret price you would not broadcast it with quotations so that your competitor could pick it up and meet your price.

Trial Examiner Norwood: Well, can they keep that secret any length of time?

The Witness: Well, no, sir; I would not say that they could, although you feel confident that something is going on, but you can't put your finger on just the exact amount." (Tr. 36360-61)

Commission counsel eventually conceded that an unspecified number of witnesses from the respondent companies would testify that friendly dealers and contractors go to their usual source of supply for cement and offer them the business when other companies offer them concessions, either in price or in terms and conditions or special services.[1] On the strength of that concession further evidence to the same effect was curtailed.

d. Forms of Price Cutting.

Secret concessions take various forms. Koch, Vice President of Lone Star, described his experience as follows:

> "Q. Now, Mr. Koch, you rely on your experience in the cement business since 1905, and tell us factually and in general and brief terms the various forms and types of price concessions which have been made by your competitors and which result in a price to a customer below the quoted price published by that competitor. (Tr. 32815)
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> • • •
>
> A. I have in my experience found that they are sold below their published price. I have found that they have included additional cement in the car. I have found that they have made no charge for bags. I have found that they have extended discount dates. I have found that they have made sand and gravel arrangements with an outsider. I have found that they have made adjustments of what, in my opinion, were fancied claims for shortage, for quality, for poor bags. All of which to me mean that they were using methods which they did not publish.
>
> Trial Examiner Norwood: Giving advantages that were reflected in price, substantially?
>
> The Witness: They all figured back to price, your Honor. (Tr. 32815-16)
>
> • • •

[1] Tr. 39231-32.

Q. Yes. Go ahead, Mr. Koch. A. I have found that they either donated or provided storage bins; that they may have—even—no. I will eliminate that 'may'—that they have even assisted in financing, through banking connections, have purchased bidding blanks; where charges have been asked for them; and have paid bond premiums.

Q. Now, when you spoke, Mr. Koch, of sand and gravel arrangements, which are made for the purpose of giving the buyer the better than the published price, just what did you mean? Will you explain the nature of such arrangements? A. Yes. The cement company makes arrangement with a sand and gravel producer to give a favorite contractor a certain price. The cement company makes up the deficit to the sand and gravel producer if he shows any loss, or to make up, so that he gets a profit.

Q. Now, you also made reference to arrangements that are made by way of rebate. Would you explain from your experience how that kind of an arrangement is developed? (Tr. 32816-17)

• • •

A. I have found by being shown the evidence that material is invoiced at the published price, and that settlement is made at a price lower than the published or invoiced price, and that sometimes refund checks are sent to the buyer, which I consider a rebate.

By Mr. Brick:

Q. Now, for how long have practices of this character continued through your experience? A. Well, they have been prevalent in one form or another ever since I have been in the business.

Q. And when you obtain information of that kind do you meet the situations and rely on the information concerning the special prices which comes to you? A. Not always. At certain times, we do.

Q. As far as your testimony is concerned, did I understand you correctly or incorrectly as confining these various practices to situations which you knew about and which have continued throughout your experience? (Tr. 32817-18)

• • •

A. Yes. (Tr. 32818)

• • • •

Q. Have you found in your experience, Mr. Koch, that conditions of this kind are more extensive or less extensive in times of dropping demand? A. Well, we always feel it more at that time, and they come to our notice more, so on that basis I would say there was more of that at that time than under times when business was good.

Q. Well, take for instance, what was the situation in 1927, 1928, when the record shows there was a larger demand? A. Well, there were times during '29, '28, the latter part of 1927, when we could ignore most of those things.

Q. Well, with respect to their existence, did I understand you correctly that such practices did prevail at that time? A. Oh, yes. They always prevail. (Tr. 32819)

• • • •

Q. Is it your testimony that even under the NRA Code there was always price cutting going on? A. Yes, to a limited extent.

Q. Much more limited than at other periods? A. Oh, my, yes." (Tr. 33237)

e. To Whom Price Cuts Given

The evidence shows that price deviations are more common in contractor sales and for jobs where large tonnage is involved than they are in the case of sales to dealers.[1]

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[1] Hogan, President, Lone Star (R) Tr. 34658.
Hoenig, Sales Manager, Nebraska (R) Tr. 42010-11.
Lucas, Vice President, Petoskey (R) Tr. 38753-54.
McGovern, Sales Manager, Hermitage (R) Tr. 36360.
Davis, President, Superior (R) Tr. 29592-93.
Nelson, J. L., Vice President, Wolverine (R) Tr. 35915-16.
Letzkus, Sales Manager, Pittsburgh (R) Tr. 37706-07.
Dawson, Vice President, Medusa (R) Tr. 40063.
Brooke, Vice President, Monarch (R) Tr. 42355-56.
Browder, Traffic Manager, Penn-Dixie (R) Tr. 38483.
And see evidence of price concessions on sealed bids, Part IV, pp. , *infra*.

The reason why price concessions are less frequent to dealers was given by Hogan, Lone Star President, as follows:

"Well, the dealer trade is scattered throughout the United States, almost in every little hamlet or village there is a dealer and the total amount of cement which individual dealers buy with the exception of a few in the larger cities is not—I mean the total amount for a year is not great enough to warrant anyone going in and making them secret prices.

There is another point entering into that, and that is if the dealer took on just one brand of cement and, at a reduced price, stocked that cement, he might easily find his trade was demanding other cement and he would not be able to reap the benefit he would if he could handle on that quantity.

Such big cities like New York, Boston, Chicago, we have from our experience been led to believe that certain dealers have been given special prices. We have never made any special prices to dealers. Never done that. Made special prices to contractors, because in that case the contractor has a job, he is the only buyer on the job, and he may not have another job for a long time and you are making him that special price for just that one job; whereas, if you gave it to a dealer, it would be a continual operation, throughout the year. We don't do it.

Trial Examiner Norwood: Do not dealers find out eventually you have sold to a contractor under the published price?

The Witness: They—when they do find out, your Honor, they naturally ask for such prices, but they are not given to them by our company, and from my experience, it is not a general practice to give it to them except in these big centers and a few others.

Trial Examiner Norwood: Wouldn't that lose you the customer?

The Witness: No, not always. The point I made in my answer, your Honor, comes in there. A dealer stocks cement and has got a trade established for your brand, and he is not always willing to throw that over just because he doesn't get what

he wants.

He sometimes sticks with us and gives us some business.

Trial Examiner Norwood: He is more interested in his competitor not underselling him, anyway.

The Witness: That is exactly the point.

Trial Examiner Norwood: If you do not make a cut to his competitor, he is not so hard to handle.

The Witness: If he is on the same basis as his competitor as to price, he is not hard to handle." (Tr. 34659-60)

Brooke, Vice President of Monarch, testified on this subject as follows:

> "Trial Examiner Norwood: What is the difference between the competitive condition surrounding the contractor and that surrounding the dealer?
>
> The Witness: Well, I would say this, that the contractor, where this business is so highly competitive, the contractor is buying cement for a particular job, and when he is through, why, we are through with that obligation; whereas, you sell a dealer at a price less than the published price, you have to continue it or usually lose a customer. (Tr. 42357-58)
>
> • • •
>
> Whereas the contractor feels under no obligations after he gets through with one job, then he goes after the next one, and it is a new deal; it is all done over again.
>
> Trial Examiner Norwood: Does he get that price prior to bidding?
>
> The Witness: Usually; yes.
>
> Trial Examiner Norwood: He usually gets all his business as a result of bidding?
>
> The Witness: Well, yes; on highway work he has to bid for it." (Tr. 42358)

Browder, Traffic Manager of Penn-Dixie, testified as follows:

> "Q. Does your company meet the price cuts to dealers, and when I say 'price cuts', I mean prices which are quoted and are lower than the written quotations sent out to the trade? A. No.
>
> Q. Will you explain why it does not? A. Well, in the case of a dealer, the dealer is not only competing with our brand of cement, with other brands of cement through his own warehouse, but he is competing with other dealers in the same town or vicinity selling our cement, and we do not feel that we can give a cut price to one dealer without making it effective to all dealers, and therefore we just refrain from giving these cut prices to dealers." (Tr. 38483)

McCracken, the only dealer witness to testify on the subject, said he did not ask for special price concessions because:

> "In the dealer's position he has to have a firm price, that is, we have to figure a job, a contract for the contractor before he puts in his bid, and he has to hold his bid open for maybe some considerable time, and then we have to furnish that contract over a period of time, and if the prices are varying up and down, why, we do not know where we stand or what to do with them." (Tr. 36713)

f. Number of Price Cuts and Percentage of Business

The evidence as to the existence of secret price cuts consisted largely of oral testimony. The absence of documentary proof and the generality of the testimony was emphasized, in the cross examination of respondents' executives by Commission Counsel as shown in the following:[1]

[1] Specific concessions in prices as revealed in the opening of sealed bids is developed in Part IV, pp. , *infra*.

J. L. NELSON, Vice President, Wolverine:

"Q. Now, referring to your testimony which appears from lines 4 to 12, page 35915,[1] I will ask you to state whether or not that is all that you can say as to your knowledge of any deviations made from published prices by your competitors?

* * *

A. Only this, that this is being called to my attention from time to time. I have not any specific case in mind at the present moment. If I had time, I could undoubtedly pick out cases, such as I have stipulated here in this stipulation.

By Mr. McIntyre:

Q. But all that you can say about that situation, Mr. Nelson, is that you believed from the circumstances as you have outlined there that deviations were made—— A. Yes, sir.

Q. —in some cases, in some circumstances, such as these you have outlined, came to your attention? A. Yes, sir.

Q. Which led you to believe—— A. That is true.

Q. —that deviations had been made? A. That is true.

Q. That is all you had? A. I would say offhand that is all, without having to refer back to some individual quotations, possibly, or reports that I had." (Tr. 36055-56)

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[1] The testimony referred to is as follows:

"* * * In jobs involving substantial quantities of cement, I have found where special prices, terms or services have been available to the user of such large quantities of cement. So far as I was able to find out these prices were at figures less than the lowest published market prices or at more favorable terms. Wolverine's practice has been to sell at its quoted price in the territory and on occasions the company has met special prices when it has been necessary to maintain its position in the market." (Tr. 35915)

Manley, Hawkeye Sales Manager, asked to cite instances where he had cut prices said he had done so in sales to a named construction company in Iowa in 1936 and 1937 and another named contractor in Des Moines in 1936 and said he could cite no instances to purchasers other than contractors.[3]

BROOKE, Vice President, Monarch:

"* * * It is pretty hard to remember back these instances that arise, that are every-day occurrences —not every day, but frequently—and we try to handle them as they come up.

Q. Well, frequently, you say 'frequently' and 'many'. I wonder if you are not inclined to emphasize those a little. Are they not rather sporadic, considering the number of dealers to whom you sell? A. Well, you never know what the day will bring forth, you know, something bobs up here and there. You get an accumulation of that over a lot of years, and it is rather difficult to recall any particular instance back in 1936 or 1935. I can only say in a general way that there is lots of it and it is fairly continuous.

Q. Well, with a little thinking, you could recall most of the instances in the last three or four years, could you not? A. No, I could not.

* * *

Q. I am trying to find out how your mind regards the word 'many' and 'lots' and so on, don't you see. I want to know in any given day how many dealers you sell, and then I am going to ask you how many of those you sold at less than your published prices. Now, can you answer and give us some—well, can you answer? Can you give us some percentage figures there on that question? A. The percentage of dealers that we sell less than published prices?

Q. Yes. A. No, I could not. That would vary over a long period. It might be—well, I just would not want to guess at that.

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[3] (R) Tr. 41851-52.

Q. Well, do you think—how many dealers do you have, Mr. Brooke? You see, we are speaking always of the period before this complaint, and I wish you would keep that in mind. How many dealers—— A. We sell about 400.

Q. And in 1936 and 1937 about how many of that 400 did you make sales to at less than your published prices? A. Are you speaking of the number of dealers or the tonnage involved?

Q. No, the number of dealers. A. Well, the number would be—the percentage would be low as compared to the total, but the percentage of shipments would be out of proportion to the——

Q. The number of dealers, if you can. A. For any year prior to 1937, or the average?

Q. No, the number of dealers that you have sold to at less that published prices, in 1936 and 1937. A. Oh, 1936 and 1937. Well, there again there is a question that is difficult to answer because we might be giving it to him in March and we did not in April, and vice versa.

Q. Yes, I could see that, but at any one time, any one period, say? A. I remember one year in Omaha, I think it was 1932, we gave the Platner Lumber Company 10 cents a barrel throughout the entire year.

Q. In 1936 and 1937, did you sell any more than 10 of your dealers cement at less than published prices? A. Yes, I would say so.

Q. Fifteen? A. Now, you are trying to pin me down to a percentage, but I cannot conscientiously give you that.

Q. Well, is that somewhere near it? A. It just is not in the books. We might compile that for you with the permission of the attorney, but I have not it here.

Q. The percentage of contractors who received cement from you at less than published prices is much higher than the percentage of dealers; isn't that true? A. That is correct; that business is more competitive.

Q. Do you ever sell to a contractor at less than, or at your published price? A. Oh, yes.

Q. Do you sell to very many of your contractor-customers at your published prices? A. Do you mean on direct sales?

Q. Yes. A. Of course, there are two ways of talking about that; in our language, we say we sell contractors for the account of the dealer, or the dealer sells him and we still consider those contractors our customers because they specify our cement when they buy from the dealer.

Q. Well, most of the sales made through dealers to contractors are made at published prices, are they not? A. Not always.

Q. I say, most of them, from the point of number of transactions? A. As far as our company is concerned, I would say yes." (Tr. 42351-56)

TITSWORTH, President, Glens Falls:

"Q. I am asking you now, Mr. Titsworth, whether or not you quoted your dealers or whether your company quoted your dealers, in the period of time that you went with it, in December, 1936, to July, 1937, any prices below your openly quoted prices?

• • •

A. I am talking about special prices. I am not prepared to say today that in that period from December, 1936, to the middle of 1937, whatever the date is, our competition with our dealer business did not warrant us meeting some prices that we found in the field that were different from any published so-called published prices.

Q. Are you saying that it did? A. I am not saying that it did. I am saying it may have.

Q. But you don't know? A. I don't know. Certainly I cannot talk for each price change.

Q. And you cannot cite us any instance where they did? A. No." (Tr. 47951-52)

STOREY, President, Consolidated:

"Q. You testified, Mr. Storey, that you tried to make your delivered prices as favorable, or more so, than competitors.

• • •

The Witness: I may have said that or I may have said as low as or as lower than. It is the same thing.

• • • •

Q. Now, building up these salesmen's price lists as you have just described was an attempt on your part, was it not, to make your prices as low as but not lower than those of your competitors? A. No; I do not think that is at all true. May I explain why?

• • •

Q. Yes; I will be glad to have you explain it. A. When our Florida mill came into operation, we established about the amount of money that we felt would be reasonable for us to try to receive on sales of our cement; that is, either a base of a so-called price base. The application of that reduced prices in Florida practically all over the State; so that in that case they made the prices at delivery points lower than they had theretofore been." (Tr. 47618-19)

Commission counsel also inquired into the percentage of business which was involved in cut prices, and the nature of the testimony as to this is shown in the following:

McGovern, Sales Manager, Hermitage:

"Q. In the main, price competition, though is confined to sales to contractors, would you say? A. Well, I would say in the majority; yes, sir; but there have been a lot others.

• • •

Q. What percent of your business is sold to contractors, Mr. McGovern? A. Oh, of course, that varies, and I would say that, or, probably twenty or twenty-five percent, maybe, in that neighborhood; twenty to twenty-five percent to contractors direct, you mean.

Q. Is that what it has been running for the past 10 years? A. That is a guess on my part. We never keep it accurately. I could not tell you, just surmise it is around that much.

Q. It sometimes runs as low as ten, probably, up to twenty-five? A. I doubt if it ever runs quite as low as ten.

Q. Does the State of Mississippi let its highway work to contractors? A. Yes, sir.

Q. And Tennessee, does it let its work? A. Yes, sir." (Tr. 36360-62).

HOENIG, Sales Manager, Nebraska:

"Q. Well, when did those price quotations of your published prices that did not reflect a basing-point price? A. Largely in highway business, and in dealer business of a substantial nature in the larger cities, like Omaha—since 1933 I doubt whether there have been more than 15 percent of the business that has been sold for highway work that was not sold at some secret prices.

Q. I am asking you now about—and you have not answered as to that question—what price quotations of your published prices of your competitors in your territory since 1933 can you cite to as not reflecting a basing-point price? A. Well, I could not cite a very many of them, that we published, as you say.

Q. Well, it is a fact that there have been very few, they have been rare? A. I could not cite very many of them.

Q. Is that correct? A. Well, I would say that the percentage is small of published prices. I did not understand your first question." (Tr. 42174)

R. W. MOORE, Vice President, Dewey:

"Q. What proportion of your contractors get better than your commercial delivered prices? A. Well, I cannot say as to the proportion, but whenever it is necessary to make a reduction in order to get the business, why, we make the reduction. We do not take any chances on losing business.

Q. In other words, it is the size of the order rather than the fact that he is a contractor; is that it? A. No, no. It is not. Because we have cut prices under our going price even to a dealer for one car order if we thought it was necessary.

Q. When have you done that? A. Well, it has been all through the years, ever since I have been there, twenty-eight years.

Q. Do you mean to say that since 1932 and prior to July 1937, that you have cut delivered prices to dealers frequently? A. Yes, sir, you bet.

Q. How frequently? A. Well, whenever it was necessary in order to get the business, and that is——

Q. Well, how frequently? A. Well, that is quite often. In percentage, I could not tell you, but I know it is quite often that we have to do it.

Q. Do you mean to say then that these delivered prices that you worked out to give to your salesmen, that you worked them out and find that you cannot meet the competition by quoting those prices? A. Yes, they are maximum prices, the most we hope to be able to get. Those are subject to variation wherever it is necessary to reduce them in order to meet competition.

Q. Do you mean to say that these delivered price lists which you worked out and give to your salesmen, that you do not use them to quote prices for your dealers? A. I did not say that.

Q. Well, I am asking you now. A. No.

* * *

Q. Then, your testimony is, I take it, that you do put these delivered prices that are compiled in your delivered price list? A. I say we quote them.

Q. Yes. A. But that is not any indication that we are going to be able to get that price.

Q. Now, you try to get it? A. Sure, we try to get all we can.

* * *

Trial Examiner Norwood: Then, do you permit them to higgle with you about the price you finally——

The Witness: Sure, yes, indeed.

Trial Examiner Norwood: You finally come to their terms, sometimes, and sometimes they come to yours?

The Witness: Sure, that is right. Yes, sir. That is the way it is done.

By Mr. Wooden:

Q. And are you there referring to what, to principally the big line yard buyer? A. Oh, no. I am referring to our whole trade.

Q. Any dealer, in other words, can get a lower price than this quoted price? A. If he can convince us that we have got to meet the reduction in order to get his business, yes.

Q. And do you take his word for it, like you do in the case of a contractor, or how do you verify what he has to say on that subject? A. Well, we use our own judgment. We do not think that our customers that have been with us for years are going to try and take advantage of us.

Q. You take their word for it, in other words? A. Yes, we take their word for it, very largely. There might be some condition that we would not be satisfied that he would be able to get a better price, and that has happened, we have acted on that sort of an opinion of the matter, and we have lost his business, and that proved to us that we were wrong.

Q. Between July 1933 and July 1937, what proportion of your dealer trade was sold at less than your regular quoted destination prices? A. I have never made any figures. I could not say.

Q. Well, without regard to figures, can't you say whether it was ten per cent or twenty-five per cent, or what?

* * *

The Witness: No, I would not want to, your Honor. It would be just a guess out of the air. I do not think it would be worth anything.

By Mr. Wooden:

Q. Would you say that ten per cent of your dealer business was done during that period at less than your regular quoted price? A. I would not say any per cent unless I had an opportunity to check the records.

Q. Would you say that ten per cent of your dealers in number of dealers get lower than your regular quoted delivered prices?

* * *

The Witness: My answer is the same, Mr. Wooden, I could not.

By Mr. Wooden:

Q. It might be ten per cent or it might be fifty, you don't know? A. That is right. (Tr. 47206-11)

* * *

By Trial Examiner Norwood:

Q. You never cut below the price you find at a definite location, then, do you? A. Sometimes that is necessary, yes, sir, because they claim they have got even a better price yet.

Q. Well, in a case like that, do you announce it to the trade, then, that price? A. No, sir. It might not be necessary.

Q. You consider that just one transaction? A. Yes, sir. That is right." (Tr. 47213)

g. The Effect of Quoting Lower Prices

Cement executives testified that they have not ordinarily been able to increase their tonnage by quoting lower than the market because competitors always meet the reduced prices.[1]

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[1] (But see the evidence showing that the establishment of new bases was largely intended to and often was successful in discouraging distant shippers from selling in the area. Section D, 4, pp. 390-398, *infra.*)

Aetna: Calvin, President (R) Tr. 30046-47;
Resp. Ex. 2002: Price memo.
Alpha: Coogan, Vice President (R) Tr. 23364.
Bessemer: Warren, F. B., Vice President (R) Tr. 32288-89.
Dewey: Moore, R. W., Vice President (R) Tr. 47115-16 47144, 47169.
Federal: Bates, J. E., Sales Manager (R) Tr. 30589, 30847.
Hercules: Brobston, President (R) Tr. 26449-50, 26133-34.
Kosmos: Horner, President (C) Tr. 12442-43.
Lone Star: Hogan, President (R) Tr. 34661.
Medusa: Dawson, Vice President (R) Tr. 40061.
Missouri: Alexander, President (R) Tr. 37121, 37385-86.
Peerless: Russell, Vice President (R) Tr. 34330.
Penn-Dixie: Wing, Vice President (C) Tr. 8165-66.

The nature of the testimony cited in footnote 1 is illustrated by the following excerpts:

HOGAN, President, Lone Star:

> "Q. What has been your experience on the advantages of price cutting—advantages or disadvantages of price cutting, special prices, I mean? A. There are practically no advantages. You can, for a time, increase your tonnage at a reduced price, but that practice begins to spread and you have prices so low nobody can make any money.
>
> I don't think we ever reduced prices over a period of time that it didn't cost us money." (Tr. 34660-61)

Coogan, Vice President, Alpha, referring to a price reduction of 10¢ to 30¢ per barrel which it initiated in 1929:[2]

> "The practical results were not satisfactory. We did not succeed in getting any larger volume of business and so far as my observation goes, I did not see any particular change in the trade conditions or in the competitive conditions and we went along just as we did before, except that we went along with the price of twenty cents per barrel lower than we had prior to August 24, an average price of twenty cents lower." (Tr. 23364)

BROBSTON, President, Hercules:

> "Q. What has been your general experience in such cases? You have already told us that in order to sell cement it is necessary for the other competing manufacturers to immediately drop their price to the same level,—what about the volume of the manufacturer who first dropped his price,—what

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Petoskey: Lucas, Vice President (R) Tr. 38750-51.
Pittsburgh: Letzkus, Sales Manager (R) Tr. 37703.
Southwestern (El Paso): Blair, W. R., Sales Manager (R) Tr. 38945;
(Osborn) Warren, G. E., Vice President (R) Tr. 28770-72.
Superior: Davis, President (R) Tr. 29615-16;
Com. Ex. 971-12 K: Answer to Burns-Clark questionnaire.
Volunteer: Hanahan, President (R) Tr. 38633.

[2] (R) Tr. 23359.

has been your observation,—did he have an opportunity of selling large amounts of cement at a lower price, or were the sales about the same except at a lower price?

Mr. Paulson: I object.

Trial Examiner Norwood: Do you remember any instances like that? Can you recall any instances like that?

The Witness: Why, there have been a great many instances, your Honor, where there have been reductions in the price of cement. I never found that the company who made those reductions in price obtained any benefit from it whatsoever. If they reduced the price they might have gotten one particular contract, or they might have gotten some business before the rest of us knew it, but, in the end, they got no more business, and the price of their market was reduced entirely.

As far as my own companies have been concerned, I am perfectly willing to say that I have never reduced the price. We think we make the best product that can possibly be made, and I feel I ought to get as much as it is possible to get; in other words, I think I ought to get the highest price at which cement can be sold in any market." (Tr. 26133-34)

R. W. Moore, Vice President, Dewey, which quoted reduced prices on an Illinois Highway Department letting:

"• • • our general experience is that we do not get any more business when we quote reduced prices." (Tr. 47116)

and respecting a reduction in prices initiated from Dewey's Oklahoma mill:

"• • • We did not experience the sensation of getting any more business from those points than we had been getting normally prior to the time we made the price reduction." (Tr. 47144)

Calvin, Vice President, Aetna, writing the President of the Company regarding a reduction of 12¢ per barrel initiated by Huron:

"It looks a little as if this price drop may be a result of the low bid put in by competitors on the recent Wayne County letting. This just goes to show that the low price quoted almost invariably establishes a new market. It is the old story—you can't get any more for your cement than the other fellow quotes. Perhaps Huron is just broadcasting to their trade what they consider is a new market price inaugurated by a competitor. Of course, I never could figure out the Huron price policy, and obviously I don't know what is in their head, and these are just thoughts passing through my mind." (Resp. Ex. 2002)

and testifying about the effect of price reductions Calvin said:

"The price of cement was lowered in Michigan three times from the time I was in Michigan, and it did not drive any competition out of the market.

• • •

Trial Examiner Norwood: Did it increase your business? Was this price made by you and all your competitors at the same time?

The Witness: That price reduction was made by a competitor in the field.

Trial Examiner Norwood: Yes.

Well, as actual facts, the prices of all the competitors in the field came down about the same time, didn't they? The others made it.

The Witness: That is right." (Tr. 30046-47)

Lucas, Vice President, Petoskey:

"During my experience in the cement industry, I have observed a great number of reductions in delivered prices at points where the Petoskey Portland Cement Company markets cement. Whenever we met such reductions in price we have found that our volume of business in such markets has not been increased, and we have found that after such reductions our customers and prospective customers have reduced the amounts of their purchases. I have always observed in the case of price declines that practically all of the companies competing with

Petoskey have met the reduction in prices in the affected markets within a few hours and that Petoskey has neither increased the amount of its orders in such markets nor increased the proportion of sales it makes to the total amount of going business at such markets. In the case of those price reductions experienced by the Petoskey Company, I have not found that the company initiating the price reduction has been able to take any substantial amount of business away from the Petoskey Portland Cement Company whenever we have met the lower prices. It has been the usual practice of Petoskey to meet such lower prices, and Petoskey has found that it could not sell cement at the old and higher prices." (Tr. 38750-51)

Hanahan, President, Volunteer, regarding instructions to his sales manager when Volunteer began to sell cement in 1927:

"A. Well, I instructed him he should go out into the territory, put his salesmen out, and sell at the lowest going price as long as we could meet that price.

Q. Mr. Hanahan, why did you do that; I mean, when you began selling why did you just meet the price? Why didn't you go out and sell lower than anybody else in the territory? A. I knew from experience that if I sold at a lower price that that would be the price all over my market at once. I was not prepared to sell it any cheaper than my competitor sold it." (Tr. 38633)

And further regarding Volunteer's experience after making a specific price reduction in its home market of Knoxville:[3]

"Q. Now, have you changed your policy of following the prices found in the field at any time? A. No, sir. Well, we have changed them.

Q. When was that? A. Well, we changed them with the T.V.A. and we changed them one time in Knoxville, in the early days, when we were not get-

[3] See also Lewis, Manager, Volunteer (R) Tr. 31477, 33003-04.

ting the amount of cement in Knoxville, the City of Knoxville, and the immediate territory, that we thought we ought to get in there because our competitor was getting it. We put in an arbitrary price in there, something like 25 or 30 cents lower than the Knoxville price.

Q. Suppose you tell us what happened? What was the result? A. Well, we did not get any more business, and within a year we took it out again.

Q. What happened as far as your competitors were concerned, if you know? A. They met the price and sold the cement.

• • •

Q. How soon did they meet your prices? A. At once, as soon as it was put out.

• • •

Q. Have you initiated any reduction in price since that time? A. To the T.V.A.; the Tennessee Valley Authority.

Q. Have you initiated—have you ever tried it again? A. No.

Q. Why not? A. Because we know it won't work." (Tr. 38634-35)

ALEXANDER, President, Missouri:

"The Missouri Portland Cement Company does not ordinarily attempt to quote below the lowest prices it finds. It has been the experience of the company that, while it might put a car or two into the market before its competitors discover its lower prices, its competitors meet the lower prices immediately upon learning of them. Consequently, the temporary advantage that might be gained by the company is lost and it must henceforth sell its cement at the lower price." (Tr. 37121)

DAVIS, President, Superior:

"Q. In your experience, what have you observed with reference to lowering of your prices affecting your competitive position, yielding more business?

• • •

Trial Examiner Norwood: Have you ever lowered prices?

The Witness: Yes, sir.

Trial Examiner Norwood: And you can give us the results of that as reflected in returns.

The Witness: Our experience has been that if we lower a price, make a price lower, the market declines in any given market.

Trial Examiner Norwood: Now, don't say 'when we do it,' say 'when we did.'

The Witness: When we did that.

Trial Examiner Norwood: If you did, what was the result.

The Witness: Our experience has been when we did that that our competitors would merely pick out another market and do the same thing, as far as we are concerned, and take business we would normally get in that market, and if it continues indefinitely it results in cut-throat competition which ruins not only the company but the industry generally. That has been our experience.

Trial Examiner Norwood: What time was that: What time was that?

• • •

The Witness: We have done it from time to time, your Honor please, lowering a price in a certain market, and our experience has been that our competitors will either go lower than the price we made at times or pick out another market in which they would make a lower price where we had business.

By Mr. Withrow:

Q. Well, has it resulted, in the past, in an increased volume of business to your company? A. No, no. It might increase in one given spot, but it would decrease in another spot, so that the volume in the plant would not be increased." (Tr. 29614-16)

G. E. Warren, Vice President, Southwestern:

"Q. Now, Mr. Warren, as a price follower, do you follow the highest price or the lowest price which you find in the market? A. The lowest price.

Q. Now, why don't you go below the lowest price quoted by any of your competitors? A. Well, I have not felt that the price was quite high enough, and I have not been anxious to establish any lower prices.

Q. And if you did quote any lower prices do you think it would increase the volume of your business? A. No, I do not see how it would.

Q. Why wouldn't it? A. Well, our experience has been that people do not recede from places where they have been selling, and that the prices generally are followed by other companies selling the same product.

Q. In other words, your competitors would meet your new lower price? A. Competitors, yes.

Q. Am I correct in understanding your testimony that if you reduce the price you would merely be getting the same volume of business at a lower price level? A. Practically so, yes.

Q. How do you know that this would be the result?

* * *

A. We have followed price reductions on numerous occasions, and have maintained our regular customers even though the lead in the price reduction had been taken by some other company.

* * *

Q. Mr. Warren, you said that you followed these price reductions. Did you find that any other companies followed them when reductions were made? A. I found that all of them did." (Tr. 28769-72)

The other evidence cited in footnote 1, pp. 285-286, *supra*, was to the same effect.

In response to the Burns & Clark Questionnaire in 1935, 31 companies reported that their market territory had not changed substantially since 1925 although several of them reported some slight shrinkage.[4] On the other

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[4] All references are to Com. Exs.:
Allentown: 969, 11 Q, 12 E.
Alpha: (for its mills at Martin's Creek, Jamesville, Cementon, Ironton, Manheim, Bellevue, La Salle, and Phoenixville): 968-8 K, 9 J; 969-1 E, 2 G; 970-15 S, 8 Z; 975-19 T; 976-9 D.
Ash Grove: 976-6 Y, 7 Q.
Castalia: 970-4 M.

hand an analysis of the answers of the companies which reported a shrinkage in their marketing area or withdrawal from some areas, shows 29 companies reporting shrinkage or withdrawal from some areas by reason of price conditions. This is shown on the accompanying table.

Colorado: 967-11 S, 13 M.
Consolidated: (for its mills at Fredonia and Mildred, Kan.): 976-5 K, 6 E.
Cumberland: 976-12 o.
Diamond: 970-4 X.
Federal: 970-10 Q.
Florida: 975-13 P.
Glens Falls: 969-13 K.
Hawkeye: 976-12 Z.
Hercules: 969-10 J.
Idaho: 967-6 S.
Keystone: 969-12 T.
Lawrence: (for its mill at Thomaston, Me.): 969-7 J.
Lehigh: (all mills except Metaline Falls, Wash.): 969-14 P, 15 L, 16 X, 17 o; 968-1 E, 1 V, 2 S, 3 N; 970-5 T; 975-15 A, 15 T, 10 X, 11 N, 3 M; 967-15 T.
Lone Star: (for its mills at Limedale, So. Norfolk, Spocari, New Orleans, Dallas, and Houston): 975-17 U; 970-2 H; 975-5 A, 6 K; 976, 13 Z, 1 E.
Louisville: 975-18 P.
Medusa: (all mills except Newaygo): 970-11 R, 12 G, 13 S, 14 J, 14 X; 975-16 J, 17 E.
Monarch: 976-8 L.
No. American: (all its mills): 969-4 L, 4 X, 6 A.
Penn-Dixie: (all mills): 968-5 o, 6 Y, 6 G; 975-7 A, 8 I, 9 Q; 976-3 X.
Petoskey: 970-7 J.
Republic: 976-2 T.
Southwestern: (for its mill at Osborn, O.): 970-2 W.
Three Forks: 967-12 I, 14 I.
Trinity: (for its mills at Houston and Fort Worth): 967-17 H, 18 B.
Universal Atlas: (for all mills except Universal, Pa.): 968-4 I, 4 Z; 975-14 K, 1 Q, 2 W, 12 H; 967-11 B, 15 C.
Vulcanite: 969-7 S.
West Penn: 970-4 B.

TABLE SHOWING WITHDRAWALS FROM SELLI

Company[6]	Date[7]	Area or Manner Affected
Alpha (St. Louis)		Withdrew from certain locali
Ash Grove (Both Mills)	"Various times"	"Temporarily affected somewh
Consolidated (Cement City)		"some territories."
Coplay		Parts of market territory.
Edison	Various times	Several markets.
	1932, 1938	New York, West of Rochest
	1934	Western Pennsylvania.
	1933, 1936, 1939	District of Columbia.
Federal		Oswego market.
Georgia		"materially reduced".
Glens Falls		Western New York
Giant		"cannot ship" into area.
Hermitage		Florida, points in Georgia and Louisiana.
Kosmos		outskirts of normal trading a
Lawrence (Siegfried)		Gradually—western New Yor and western Pennsylvania.
Lone Star (Hudson)		West of Rochester.
No. Birmingham		Some Kentucky and Tenn business; southern Florida.
Bonner Springs	1931-32	Oklahoma territory.
(Generally)		Michigan, Wisconsin, Parts Iowa, Minnesota, North Da and South Dakota.
National		"materially reduced".

[6] The information is taken largely from answers to the Burns & C from areas because of the building of a new local plant are not shown

[6] Where a company operates more than one mill, the affected mills are set ou

[7] Unless otherwise indicated the answer covers the period from January 1, 19

EA BY REASON OF PRICE CONSIDERATIONS[1]

Cause	Reference
e prices at Cape Girardeau and Gas Belt and low nets.	975-4 D
sub-normal prices of other plants".	976-6 Y, 7 Q
iven out" by changes in the differential between base rices, "low bases eliminate us" *i.e.* Ironton and other Ohio bases.	970-7 V
w mills and base prices at some of them having freight dvantage and quick delivery.	969-8 Z
ab. of new mills—lower destination prices and better ervice.	Com. Ex. 969-8 i (Resp. Ex. 2544 (Tr. 35633 (*et seq.*
ice reduction" and trucking service.	30590
w base points and reduction of old base points.	975-1 E
w mills, lower prices and better service.	O.P. Tr. 47887-88
wer net yield in proximity to competitor having a base.	969-11 A
rt prices, lower base prices and new mills.	976-10 U Tr. 36119-20
w bases in Illinois and Ohio.	970 (1 E (1 U
creased competition and inability to give prompt rail ervice.	969-6 Q
tablishment of Buffalo base.	969-3 W
ice at Marquette declined—not attractive as to price.	975-5 Q Tr. 34609
w prices prevailing.	967-16 N
"profit returns".	Tr. 32647
hanges in basing point differentials, establishment of ew mills and basing points".	976-9 Y

estionnaire and exhibits are Com. Exs. unless otherwise indicated. Withdrawals rice consideration also operated as shown by the company's answer.

enthesis

various times in 1935.

Company[6]	Date[7]	Area or Manner Affected
Missouri	1932-33	Iowa, Nebraska, Oklahoma, M sissippi, Kentucky and Indi
Nazareth		Withdrew from Buffalo, Os and Washington, D. C.
Nebraska		Some parts almost abandone indifferent to tonnage.
North American		"Minor changes" withdrew f Buffalo and neighborhood in and around Norfolk.
Northwestern States	1932	Certain areas.
Peerless	1932	Central Ohio.
Penn-Dixie (Richard City)	"some periods"	Accepted only "old dealer busi in Arkansas and Mississip
(General)	1940	Same in Vermont, New Ham shire, Louisiana, Arkansas a Nebraska—solicitation on p time basis.
Pittsburgh		Some areas.
Signal Mountain	Various times 1931-32	Territory contracted. Hamilton County, Ohio and K tucky.
Southern States		Restricted area.
Southwestern (Osborn)	1931-32	Lower Michigan, part of Illi and West Virginia: discont ued active solicitation.
Superior	1931	Cleveland.
		Cut "drastically" in Ohio, Indi West Virginia and Kentu Michigan, Louisville and So ern Indiana.
Trinity (Eagle Ford)		Arkansas.
Universal	1930-32	Western Ohio, Cleveland and T ledo, northern Ohio, west New York, southern West V ginia.
Volunteer		Some points temporarily unde able.

Cause	Reference
clining consumption and unattractive prices.	Tr. 37126-27
rinkage in mill net realized and service factor; lowered prices.	969-9 P Tr. 28363-66
ts lowered by location of other mills and sub-normal prices in the depression.	976-4 M
ice and service.	969-5 P Tr. 33792-93
ice war and depressed mill bases all around.	975-2 G
ses governing the territory were so abnormally low as to make mill net unfavorable.	970-6 H, 6 V
w nets.	Tr. 38140
	Tr. 38140
Mill net became unattractive".	969-1 S
Low nets resulting from base price reductions".	975-13 A
w Iron ton base 1931-32.	
educed prices at base points.	976-15 G
neral low price conditions.	970-2 W, 3 I
eduction in price.	Tr. 39445
tablishment of new basing points in Ohio, Indiana and Kentucky, and bases at Cleveland, Toledo, Fultonham, Osborn, Ohio, Wyandottee, Michigan and Kosmosdale.	970-5 I
fter Okay mill built.	976-13 L
cline in competitive base prices.	970-13 D
me points temporarily undesirable.	976-10 J

Cement executives testified that failure to meet new low prices is the equivalent of abandoning the market, and that to retain their markets and customers they must always meet lower prices.[8] Faced with this prospect the manufacturer almost always meets lowered prices quoted by a competitor even though the prices may be unattractive to him.[9]

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[8] Pearson, Secretary-Treasurer, Cumberland (R) Tr. 39855-56.
Brobston, President, Hercules (R) Tr. 26193.
Robeson, Vice President, Nazareth (R) Tr. 28194.
Coogan, Vice President, Alpha (R) Tr. 23834, 24352.
Manley, General Manager, Hawkeye (R) Tr. 41612.
Dannelly, Vice President, National (R) Tr. 39492-93.
Koch, Vice President, Lone Star (R) Tr. 32647.
Lucas, Vice President, Petoskey (R) Tr. 38744.
Davis, President, Superior (R) Tr. 29595.

[9] Allentown: Com. Ex. 971-30 I-J.
Alpha: Coogan, Vice President (R) Tr. 24351-52, 24922 (sometimes take less than out-of-pocket cost).
Bessemer: Dankel, Sales Manager (C) Tr. 11346-47, 11350; Warren, F. B., Vice President (R) Tr. 32087-89.
Hawkeye: Manley, *supra* (R) Tr. 41612.
Hercules: Brobston, President (R) Tr. 26133, 26382; Resp. Ex. 1086 B: Letter 3/24/36, Brobston of Hercules to Mrs. Kind.
Kosmos: Horner, President (C) Tr. 12440-42 (sometimes means loss).
Lone Star: Com. Ex. 971-9 L.
Missouri: Alexander, President (R) Tr. 37328.
Penn-Dixie: Browder, Traffic Manager (R) (Stip.) Tr. 38140.
Signal Mountain: Com. Ex. 975-13 A.
Southern States: Com. Ex. 976-15 J.
Southwestern (Osborn): Warren, G. E., Vice President (R) Tr. 28738; Com. Ex. 970-2 Z; (El Paso) Blair, W. R., Sales Manager (R) Tr. 38945.
Volunteer: Com. Ex. 976-10 M; Parsons, Sales Manager (C) Tr. 5003-04.
Hanahan, President (R) Tr. 38633.
West Penn: McKee, Vice President (R) Tr. 27709-10, 27942-46.
Whitehall: Elliott, Vice President (R) Tr. 28498 (many matters to consider).

The nature of this evidence is illustrated by typical excerpts set out below:

MANLEY, General Manager, Hawkeye:

> "It has been the experience of the Hawkeye Portland Cement Company that it is necessary at times to continue to solicit a market where its net return on sales has been unsatisfactory, in order to obtain the sales volume necessary to operate its plant continuously, and in order to maintain its following and keep its brand before the public in its markets. The establishment of customer contacts is a long and expensive process, and the time and expenditure used in developing a market is regarded by the Hawkeye Company as an investment." (Tr. 41612)

G. E. Warren, Vice President Southwestern (Osborn, Ohio, mill), questioned as to why the company sells in a market where it realizes a mill net of only $1.20 per barrel:

> "Q. Is $1.20 a satisfactory net to you? A. Well, it would not be for all of our products, no.
>
> Q. Well, why do you take $1.20, then?
>
> • • •
>
> A. To reach out for enough to secure business to operate our plant.
>
> • • •
>
> Q. Well why don't you withdraw from this marketing area with a mill net as low as $1.20? A. Well, the demand is quite a variable thing, and the demand changes, and so do prices.
>
> Q. How long do you try to maintain your own customers in some of these distant markets, even though you get a low net? A. Did you say how long?
>
> Q. Yes, for how long a period? A. Well, we try to maintain them continuously if we can.
>
> Q. Have you ever withdrawn from any market in which you actively solicited cement sales? A. Yes, we have.
>
> Q. What market? A. From Cleveland, and withdrawn principal solicitation from around Toledo.

Q. Well, what were the circumstances generally surrounding your withdrawal? A. Well, we were unable to get enough business to maintain a salesman; it seemed to be wasteful to continue solicitation where we could not secure enough orders to back him up.

• • •

Q. Now, in an answer a few moments ago you referred to one reason you went into a territory, the long-term relations you had had with a customer. What do you mean by this 'long-term relationship'? A. Well, I think that would apply particularly to a contractor with whom we had been more or less regularly doing business, and there are sometimes when he gets a little further from home, why, we follow him and sell him if we can, retain his patronage and our contacts with him.

Q. And why do you follow him? A. Well, even though that might not be as attractive as some business he has had before, he will move again and we do not want to lose him out of our contact and into the hands of someone else." (Tr. 28737-40)

HORNER, President, Kosmos:

"A. The net return to us on certain business is so low that if we had to do all or a great part of our business at that net return, it would cause us a loss.

• • •

Q. And do those situations arise frequently in the sales that you make, Mr. Horner? A. Yes, it is always a question whether we shall take certain business that gives us a low net return in order to have that additional volume or whether it is better not to take it.

Q. Now, in those situations where it would net a loss, why don't you increase the price? A. Our competition at those points wouldn't permit us to make any sales if we increased the price.

Q. In other words, you are meeting the market price again? A. Yes.

By Trial Examiner Norwood:

* * *

Q. What would be the result if you did come under the price?

* * *

Q. Would the other side meet it? A. Unquestionably.

* * *

The Witness: If we made a lower delivered price than was already existing in the market, the other people would meet it, unquestionably." (Tr. 12442-43)

Browder, Traffic Manager, Penn-Dixie, referring to markets where volume is low or prices are not attractive:

"Penn-Dixie does not withdraw entirely from markets such as these because it cannot afford to. It has poured great sums of money into their development and prefers to keep up its contacts which it would lose were it to withdraw even for a short time." (Tr. 38140)

McKee, Vice President, West Penn, asked how low he would have to set his prices in order to keep out a substantial number of competitors said he "would probably have to go down to our out of pocket cost", and further:

"Q. Now, do you sell any cement where the net return to you at the mill is less than the cost of production, Mr. McKee?

* * *

A. Yes, we do sell where the net to us is less than total cost of production, but not less than out-of-pocket cost of production." (Tr. 27709-10)

The Trial Examiner subsequently undertook to follow this line of inquiry as follows:

"Trial Examiner Norwood: Do you think that reducing your price in any and all cases would reduce your profits?

The Witness: Yes, because if we reduced our price such a reduction would be met, as soon as known, and those things are known very promptly, and we would get no greater volume, and have our price at that destination, or in that area, reduced, and would suffer thereby, and our loss would be greater.

Trial Examiner Norwood: Do you think, though, that if you contracted for a large volume, at a small price reduction, it would not increase your profits?

The Witness: Well, we never look on any sale from just the standpoint of the one sale. We have to think of its effect on our other customers. We have to think of its relation to what we are going to do for many years to come, and we, therefore, have to treat a problem from the standpoint of the other factors that relate to it.

Trial Examiner Norwood: Well, in sales in your immediate neighborhood, where others would not have an equal advantage with you, would that same condition prevail, where, say, they could not afford to meet the price, or come lower?

The Witness: We have found, from observation, that prices have been met down to what is apparently close to the out-of-pocket cost of production, at least measured by our experience, and the small area to which we have an advantage in freight rate only has an advantage to the extent of a maximum of 4 cents a barrel.

Now, if we reduced our price to 4 cents per barrel above our out-of-pocket cost, which would theoretically be at the out-of-pocket cost of our nearest competitor, we could not expect to continue in business, because we would have all of our overhead and fixed expenses to carry. Therefore, to reduce—experience has shown that you cannot keep anyone out of a territory by reducing the price, unless it goes down to the out-of-pocket cost of the nearest mill, and if we would do that we couldn't continue in business because we would have the 4 cents' freight advantage that we have at our best possible destination, would be insufficient to carry overhead.

Trial Examiner Norwood: Well, now, suppose that you raised your local price.

The Witness: To give us an exclusive market?

Trial Examiner Norwood: Raised your local price in your exclusive field, where you have the advantage of your competitors as to cost of delivery, wouldn't that give you a little extra profit?

The Witness: A—there will be a meeting of the competitive price down to the out-of-pocket cost. Now, the difference between our—if our out-of-pocket cost is the same as our competitors, which is roughly the case, I presume, at our closest market, we only have a 4-cent advantage in freight.

By Mr. Leisure:

Q. Yes. A. And, hence, if all that we could gain would be 4 cents per barrel above the other man's out-of-pocket cost, and 4 cents per barrel would only be a fraction of the difference between out-of-pocket cost and total cost, because the items of overhead, financial taxes, and so forth, are so heavy in an industry of this type—therefore, there is no way in which we can keep competition out of our closest and most favorable market without putting ourselves out of business.

Trial Examiner Norwood: Well, do you go out into the other fellow's territory and sell at out-of-pocket cost?

The Witness: We sell in the other man's territory at figures below our total cost.

Trial Examiner Norwood: Yes.

The Witness: But in no case at figures below our out-of-pocket cost.

Trial Examiner Norwood: Well, why do you do that?

The Witness: We do that because if we have a certain volume of business, and we can increase that business, well, say, 20 percent, that extra 20 percent will tend to carry these fixed charges of administration, financial, and taxes, which represent the difference between out-of-pocket cost and total cost.

Trial Examiner Norwood: And that does not reduce your profit average?

The Witness: That will—that will reduce our losses, because it will give us a greater volume on which to carry these items of fixed expense.

Trial Examiner Norwood: Well, do you have no points of advantage where the other fellow's out-of-pocket cost would give you a small profit.

The Witness: We do have a small area where the other man's out-of-pocket cost would give us 4 cents above our own out-of-pocket cost, but that would still be a very considerable loss under our total cost.

Trial Examiner Norwood: Wouldn't he get tired of that?

The Witness: Well, I don't know. Experience would seem to indicate that there have been certain sections of the country where prices were low for a considerable period, and the history of bankruptcies in the cement industry speaks for itself. There have probably been more bankruptcies in percentage in the cement industry than in any other single group except the coal industry." (Tr. 27942-46)

COOGAN, Vice President, Alpha:

"Q. Aren't the freight advantages frequently so large that outside mills could not come into given markets without selling at a loss? A. I have never known any price made in any market that kept competitors from coming in that market.

Q. Even though they sold at a loss? A. I think at times they might have sold at a loss, as far as total cost is concerned, and maybe not out-of-pocket loss.

Q. Have you sometimes gone into territory where you were at a freight disadvantage to such an extent that you sold at a loss? A. Our company always tries to get at least our out-of-pocket cost, but there might have been occasions in some markets where we have sold cement at a loss; there have been such occasions, and we have continued in those markets rather than to forsake the markets and then attempt to get them back under later conditions.

Q. Do you mean sold at a loss compared to your out-of-pocket cost or to your total cost? A. I told

you that we try, in so far as possible, to get our out-of-pocket cost, but I wouldn't want to say that we had succeeded in a hundred percent of the cases." (Tr. 24351-52)

Cement executives testified that they are reluctant to withdraw from an established market because of the expense and difficulty of re-entering a market once abandoned.[10] Representatives of three Lehigh Valley companies testified that in their area they have no new markets available to turn to in the event they should withdraw from any of their established markets.[11]

DANNELLY, Vice President of National, testified that once having given up an area in which they had sold, they have "not found it possible" to re-enter that market because:

> "Well, of course, in those territories in which the price is so low that it is not interesting, if you withdraw you lose your contact with your dealers and your customers; and if you try to go back in there, why, your competitors have already grabbed them off." (Tr. 39492-93)

ROBESON, Vice President of Nazareth, testified:

> "Q. Well, you have told us that this low price was unprofitable to you, and that you only met it just as far as it extended; instead of continuing to meet it and lose money, why didn't you just with-

[10] Dannelly, Vice President, National (R) Tr. 39492-93.
Robeson, Vice President, Nazareth (R) Tr. 28194.
Coogan, Vice President, Alpha (R) Tr. 23834.
Brobston, President, Hercules (R) Tr. 26193.
Koch, Vice President, Lone Star (R) Tr. 32647-48.
Elcock, Vice President, Southern States (R) Tr. 37499-500.
Browder, Traffic Manager, Penn-Dixie (R) Tr. 38140.

[11] Robeson, *supra*, Tr. 28144.
Coogan, *supra*, Tr. 23835-36.
Brobston, *supra*, Tr. 26193.

draw from that market temporarily? A. You couldn't afford to withdraw, Mr. Leisure. The customers involved there were customers we had had a long continued relationship with." (Tr. 28194)

And at another point:

"Q. What do you do? How do you go about developing a new market, which has not been active for some time? A. Well, there are relatively few markets left that you can develop, as Lehigh Valley manufacturers,—one,—and our market spread over a much wider market than they are now, and we were gradually driven back; but in order to enter into a market, what you have to do is to make a survey of it, if it is tonnage potentialities, and your likelihood of your success of what you would net out of a territory would be one of the things you could consider, and then you would have to go out and hire as capable a salesman as you could find and put him into the territory, and it would take usually —if it is a market where you have not been identified and active—it would probably take a matter of two or three years to bring back any sort of identification in that market.

Q. From what you said, are there no markets that you could develop? A. I can't think of any that the Lehigh Valley could find." (Tr. 28143-44)

Koch, Vice President of Lone Star, testified:

"Q. Has it been your experience that it is difficult to reestablish yourself in a territory in which you have stopped soliciting at some time or other? A. Yes. Unfortunately, we have withdrawn from some territories and reentered them. My experience is that when you come in again you probably got a harder task than if you were new on the market, because the buyer generally feels that you deserted him when the business did not suit you, and, therefore, he should not give it to you just because you are coming back.

Q. Does reestablishing of your brands in the territory where you have previously sold mean an ex-

penditure of a small or a considerable amount of sales expense? A. Oh, very much more, both to re-establish the brand and get the customer's good will, —the buyer's good will; he is not a customer yet." (Tr. 32647-48)

Alpha's Vice President Coogan testified that depressed prices in seaboard areas to meet the competition of imported cement gave Alpha a net that was "materially less" than its normal net.[12] Asked why Alpha did not suspend operations in those areas until the prices increased he testified:

"A. Well, any company that expects to stay in business cannot abandon any markets if they are doing business, and where they feel that—we expected to continue doing business—if you once go out of a market it is just like beginning all over again, to get back into that market, you never will regain the dealers that you formerly had in that market, because they will feel that you are not giving them the protection which has been given to the dealers of other domestic companies, and it is almost impossible to get back into markets where you go out on account of low prices.

Now, we have had some experience where we did withdraw from markets for that reason, and it was —it has been a very difficult job to get back into such markets.

• • •

Q. What has been your experience, Mr. Coogan, in a situation of that kind where, as you have said, you have abandoned a market? Do you or do you not have other new markets available? A. Well, if we knew of any new markets available at the present time we would certainly get after them, because, of course, we are only operating at approximately 40 per cent, and I don't know of any available markets that are not fully covered." (Tr. 23834-36)

[12] (R) Tr. 23833.

Regarding the same depressed port prices Brobston, President of Hercules testified as follows:

> "Q. Have you ever considered abandoning these markets where you have depressed prices, because of foreign cement? A. No, sir; we couldn't afford to abandon markets like New York and Boston.
>
> Q. Why not? A. They are our main market. If we abandoned them we wouldn't have any market. It is absolutely necessary for us to keep in those markets.
>
> For instance, in the Boston market, we kept in the Boston market when our net return was very unsatisfactory, but we were in hopes that the price would come up, and we couldn't afford to abandon that market or we would have been out a large part of that trade.
>
> Q. Have you ever considered abandoning them temporarily when these depressed prices existed? A. No. If you abandon a market temporarily it is almost impossible to get back.
>
> Q. Are there any new markets which you could develop today, Mr. Brobston? A. Unfortunately, for the Lehigh Valley, there are no new markets that we can reach on account of the difference in the freight rates and the new mills that have been established." (Tr. 26193-94)

F. A. Weibel, Secretary-Treasurer of the non-respondent of Allentown explained this in a letter to Professor Burns on June 5, 1935:

> "• • • Your question as to why we make shipments in low net territory can be easily explained when you view the long range distribution policy a cement company must have after years of operation. Every market into which we are now shipping, even though some of that market is low net business at the present time, was at one time a market which this company considered favorable and produced a revenue which was satisfactory. Changes in mill bases, new mill bases, or changes in freight rate structure, have changed certain markets to some extent. After

spending years of effort and money in certain markets it is only natural that old customers will be continually served even though there might be no direct effort made to increase your trade in that market. If conditions change, your brand is established and you can continue to try and improve your position. Our experience has shown us that it is not necessary for you to be out of a market very long before you are entirely forgotten." (Com. Ex. 971-30 I-J)

5. Meeting Competition

a. Price Leaders

There is a considerable body of evidence that there is no particular company or companies which are "price leaders."[1] Price changes have been initiated or attempted by the following 24 companies:

[1] In answer to the Burns & Clark Questionnaire the following asserted that no mill or group of mills could be characterized as the "price leader." (All references are Com. Exs.):

Colorado: (967-12 D)
Edison: (969-8 T)
Giant: (969-11 L)
Glens Falls: (969-13 V)
Hercules: (969-10 V)
Idaho: (969-7 D)
Keystone: (969-13 E)
Lawrence: (969-7 B)
Lone Star: (967-16 Y; 976-1 P, 14 K; 975-6 B, 6 V)
Louisville: (975-19 A)
Medusa: (970-12 R; 975-16 U)
Monarch: (976-8 W)
Nebraska: (976-5 F)
North American: (969-5 I, 6 L)
Northwestern States: (975-2 R)

The following witnesses also so testified:

Robeson, Vice President, Nazareth (R) Tr. 28005.
Brobston, President, Hercules (R) Tr. 26136.
Bates, J. E., Sales Manager, Federal (R) Tr. 30592.
Calvin, President, Aetna (R) Tr. 30018.
Wood, General Manager, Green Bag, W. Va. (R) Tr. 39896.
Horner, President, Kosmos (R) Tr. 36896-97.
Dawson, Vice President, Medusa (R) Tr. 40060.
Letzkus, Sales Manager, Pittsburgh (R) Tr. 37814.
Stone, Vice President, Universal Atlas (C) Tr. 478.

Aetna[2]	Lawrence[10]
Allentown[3]	Lehigh[11]
Alpha[4]	Lone Star[12]
Ash Grove[5]	Marquette[13]
Dewey[6]	Medusa[14]
Edison[7]	Missouri[15]
Giant[8]	North American[16]
Huron[9]	Northwestern States[17]

[2] Calvin, President (R) Tr. 30049, 30041.

[3] Brobston, President, Hercules (R) Tr. 26305-06.
Coogan, Vice President, Alpha (R) Tr. 24639.

[4] Coogan, *supra*, Tr. 24639.

[5] Sunderland, President (C) Tr. 13738.

[6] Moore, R. W., Vice President (R) Tr. 47144.

[7] Sweeney, Vice President (R) Tr. 35636-37; Resp. Ex. 3545: Edison announcement, 9/7/22.

[8] Coogan, *supra*, Tr. 24639.

[9] Warren, F. B., Vice President, Bessemer (R) Tr. 32099; Resp. Ex. 2011 A-E: Memo 4/20/38, Calvin, Aetna to Johnson.
Calvin, *supra*, Tr. 30040.

[10] Coogan, *supra*, Tr. 24639.
Ackerman, Vice President (C) Tr. 7157-58.

[11] Robeson, Vice President, Nazareth (R) Tr. 28173-74;
Coogan, *supra*, Tr. 24639; Resp. Ex. 1222: Memo 9/3/35, Bowen, Lehigh to Druckenmiller.

[12] Coogan, *supra*, Tr. 24639.

[13] Coogan, *supra*. Tr. 24640-41,
Colburn, Vice President (R) Tr. 39049.

[14] Dawson, Vice President (R) Tr. 40056, 40052.

[15] Alexander, President (R) Tr. 37370.

[16] Porter, President (R) Tr. 33794-96, 34035-36.

[17] Royal (reporting Cabanis—"rarely") (C) Tr. 12520.

Peerless[18]	Superior[22]
Pittsburgh[19]	Universal[23]
Southern States[20]	Volunteer[24]
Standard[21]	Wolverine[25]

Some companies have initiated price changes more frequently than others, however, and have sometimes been referred to as "price leaders". Thus, answering the Burns & Clark Questionnaire, Alpha reported that changes were usually made by one of the chain mills[26] and that Lehigh had probably made more than any other. For its St. Louis territory, however, Alpha reported that it and Missouri were the price leaders.[27] F.T.C. Investigator Bass testified that Dewey's President Tyler had told him that:[28]

> "* * * all of the Lehigh and Universal plants are basing points, and that they are the recognized leaders in the industry and that the Dewey company, being a smaller company, could do no better than simply follow the prices of these two concerns at their basing points which are applicable."

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[18] Russell, Vice President (R) Tr. 34474; Resp. Ex. 2407: Memo 7/1/35, Luck, Peerless to Skarvi of Peerless.

[19] Letzkus, Sales Manager (R) Tr. 37693.

[20] Elcock, Vice President (R) Tr. 37502, 37516.

[21] Bates, J. E., Sales Manager, Federal (R) Tr. 30809.

[22] Davis, President (R) Tr. 29566-71.

[23] Coogan, *supra*, Tr. 24639-40.

[24] Hanahan, President (R) Tr. 38634.
Parsons, Sales Manager (C) Tr. 5084.

[25] Nelson, J. L., Vice President (R) Tr. 35907.

[26] Com. Exs. 968-8 X, 9 W; 970-16 H; 975-9 P, 20 G.

[27] Com. Ex. 975-4 Q.

[28] (C) Tr. 13383.

And F.T.C. Investigator Johnston, reporting an interview with Tyler said:

> "He said it was, to the best of his knowledge, usually the large companies and, I believe, he said Lehigh because they have a plant at Iola, if I recall correctly, that Lehigh at Iola was usually the company that sets the prices. At least that was his opinion, that they did. That is what he told me." (Tr. 17540)

Another F.T.C. Investigator, Parker, reported on a conversation with Johnson, President of Aetna, as follows:

> "Mr. Johnson said that his firm was not large enough to antagonize such large firms as the Huron, and that if they did buck them it would be disastrous for him, because they were in a position to dictate the prices and he had to fall in line * * * if they opposed any of the base prices established by the Huron that counter-quotations by Huron would be fatal to his business, he could not operate in a manner which would permit him to fight Huron." (Tr. 1908)

b. Price Followers

A substantial number of companies characterized their pricing policy as one of meeting prices as they find them in the markets where they sell,[1] although some of them

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[1] Arkansas: Thompson, Sales Manager (R) Tr. 46424-86, 46617-19.
Bessemer: Warren, F. B., Vice President (R) Tr. 32526, 32530.
Castalia: Com. Ex. 3121 E.
Cumberland: Pearson, Secretary-Treasurer (R) Tr. 39851.
Diamond: Com. Ex. 3139.
Georgia: Com. Ex. 3116 B.
Glens Falls: Titsworth, President (R) Tr. 47891-93.
Green Bag, W. Va.: Wood, General Manager (R) Tr. 29407.
Hawkeye: Com. Ex. 3142 C-D; Manley, General Manager (R) Tr. 41615.
Hermitage: McGovern, Sales Manager (R) Tr. 36125, 36342-43.
Idaho: Com. Ex. 3171 C.

have on occasion initiated changes in prices.[2] The evidence as to their policy of meeting prices is substantially the same as is shown by a few samples set out below.[3]

A Federal Trade Commission questionnaire sent to members of the industry in 1931, inquired, among other things, how each company determined its delivered prices on "sealed bids or when meeting competition." Diamond discussed its pricing at length and on the point in question said:

> "* * * Our method of arriving at a quotation for any destination point is to ascertain the prevailing price at that point and to quote the same price. It is manifestly impossible in marketing a standard commodity, such as portland cement, to obtain a price higher than the prevailing price in any given market. In any case where a manufacturer quoted a price under the market, this price might be met by

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National: Dannelly, Vice President (R) Tr. 39628, 39629-30.
North American: Porter, President (R) Tr. 33792, 33794, 33806, 33814.
Oklahoma: Thompson, Sales Manager, Oklahoma & Arkansas (R) Tr. 46484-86, 46617-19.
Petoskey: Lucas, Vice President (R) Tr. 38747-48.
Pittsburgh: Letzkus, Sales Manager (R) Tr. 37694.
Southwestern: Warren, G. E., Vice President (R) Tr. 28762, 28769.
Southern States: Elcock, Vice President (R) Tr. 37502.
Standard: Adopted Tr. 38742-44.
Superior: Davis, President (R) Tr. 29590-91.
Volunteer: Parsons, Sales Manager (C) Tr. 5008-09, 5032-33; Hanahan, President (R) Tr. 38633; Roberts, Traffic Manager (R) Tr. 31713.
Wabash: Com. Ex. 3148 C.
West Penn: McKee, Vice President (R) Tr. 27695-97.
Wolverine: Nelson, J. L., Vice President (R) Tr. 35905-06.

[2] See pp. 309-311, *supra*.

[3] Reference to and use of basing points by these companies in connection with their prices is covered in Section D, pp. 445 *et seq.*, *infra*.

his competitors which would have the effect of reducing the base price, and thus mean a general reduction of prices throughout the territory affected."[4]

Cumberland answered the same question as follows:

"When submitting delivered prices on cement by sealed bids, or otherwise, at any given destination we always quote on a basis equal to the lowest price per barrel last known by us to have been offered by one of our competitors at that destination and upon the terms and conditions of sale as in effect with us at time of bidding."[5]

North American, Petoskey and West Penn answered to the same general effect[6] and the testimony respecting Green Bag of West Virginia and Superior was much the same.

Green Bag of West Virginia did not answer the questionnaire, but the general manager, A. T. Wood, testified that the companies tries "to meet competition when we find it."[7]

Superior did not answer the questionnaire, but E. H. Davis, President, testified that his delivered prices were determined:

"• • • by our best guess based on the information we receive from the salesmen in the territory as to what the market will stand. • • • We at times have gone a little lower than our competitors at a given destination; but, ordinarily, we attempt to meet • • • the lowest price that we find in the field." (Tr. 29590-91)

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[4] Com. Ex. 3139 C.

[5] Com. Ex. 3132 D.

[6] North American: Com. Ex. 3124 D.
Petoskey: Com. Ex. 3123 D.
Southwestern (El Paso): Blair, W. R., Sales Manager (R) Tr. 38947.
West Penn: Com. Ex. 3134 C.

[7] (R) Tr. 29407.

Hawkeye, Pittsburgh, Standard, Wabash and Bessemer submitted substantially similar answers to the FTC questionnaire.[8] Typical was that of Pittsburgh:

> "Our selling price is determined by the competition we have to meet and these competitive prices are ascertained by our salesmen in the field who pick up quotations sent out by competitors and sometimes see invoices. * * *" (Com. Ex. 3133 G)

Representatives of Hawkeye, Pittsburgh and Bessemer testified to the same effect.[9] There was no other evidence on the point respecting Wabash or Standard.

H. H. Titsworth, President of Glens Falls, testified that "through salesmen and old customer accounts, we try to learn the lowest destination price which we have to meet" and "we meet it or not as we see fit."[10]

E. W. McGovern, Hermitage Sales Manager, testified that they meet "the lowest prices that our salesmen find at delivered points" and that he has no interest in the manner in which he finds these prices made up.[11]

W. B. Elcock, Vice President of Southern States, testified that as a "price follower" "I normally find prices out in the field, and I meet that price."[12] Asked how he determines the competition he has to meet he said:

> "Everybody in any given town acquainted with the industry at all knows what the competition is

[8] Bessemer: Com. Ex. 3168 C.
Hawkeye: Com. Ex. 3142 C-D.
Pittsburgh: Com. Ex. 3133 G.
Standard: Com. Ex. 3169 D-E.
Wabash: Com. Ex. 3148 C

[9] Manley, General Manager, Hawkeye (R) Tr. 41615-17.
Letzkus, Sales Manager, Pittsburgh (R) Tr. 37691-94.
Warren, F. B., Vice President, Bessemer (R) Tr. 32333-35.

[10] (R) Tr. 47891.

[11] (R) Tr. 36125.

[12] (R) Tr. 37503.

there. Everybody knows the price of cement at any point."[13]

Roberts, Traffic Manager of Volunteer, testified that the company is a price follower and determines competitors' prices "through quotations which we pick up and from information" received from salesmen and customers.[14]

West Penn in the questionnaire said its prices are "based upon prevailing market quotations at the point of delivery."[15]

J. L. Nelson, Vice President of Wolverine, said the company is a price follower which meets the lowest delivered prices quoted in any market where it wishes to sell.[16]

The evidence as to the price policy of Idaho, Utah, Colorado and Union on this point is not clear. Colorado and Union stated in response to the Questionnaire that all their assets were owned and their plants operated by Ideal Cement Company and, asked how they determined prices on sealed bids or when meeting other competition, stated "Don't Apply."[17]

Responding to the FTC Questionnaire as to the method of determining its delivered prices on "sealed bids" or when "meeting other competition" Idaho said:

> "We use the price the competing mills secured business with on previous bids and either meet it or bid a little under. Owing to just entering this territory, we have lost some business by not being able to figure just what competing mills bid on some jobs."[18]

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[13] (R) Tr. 37503-04.

[14] (R) Tr. 31713.

[15] Com. Ex. 3134 C.

[16] (R) Tr. 35905.

[17] Com. Ex. 3176 R, LL.

[18] Com. Ex. 3171 C.

Utah responded to the FTC Questionnaire as follows:

> "No standard method used. Bids are governed by competitive territory in which cement is delivered and transportation rates."[19]

c. Price Identity and Competition

Commission counsel approached the identical price question by inquiring as to other possible causes of identity and as to whether or not the explanations of respondents for price identity, including their testimony regarding meeting competition, did not indicate the absence of competition.

Typical excerpts from the examination of industry witnesses by Commission counsel in this vein follows:

PARSONS, Sales Manager, Volunteer:

"By Mr. Wooden:

Q. In a general way, do you succeed in having your prices at given destinations the same as prices of other mills at those destinations? (Tr. 5032) A. We attempt to meet the competitive quotations as we find them, Mr. Wooden.

Q. By that do you mean that you try to make your prices at a given destination the same as other mills? A. No, we do not attempt to make our prices the same.

Q. What do you mean by 'meeting them,' then? A. Well, if I see a quotation of $2.50 at a given point, and we have reason to believe it is a market and not an individual quotation, why, we may usually try to meet such a price. Now, the other man's price may be $2.50, as far as the price of somebody else is concerned, I do not know; that is my price there.

Q. Then, you mean you try to make your price the same at a given destination as the other fellow's price at that destination?

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[19] Com. Ex. 3137 C.

Examiner Norwood: Is that right?

The Witness: We meet the competitive quotations, your Honor, as we find them in the field.

• • •

Q. All right, what do you mean by 'meeting the price' of the other mill at a given destination? A. We cannot hope to get an order if our price is higher than our competitors'. We believe that we have got as good cement—we know we have as good cement as anybody—I believe it is better in some instances—

Examiner Norwood: (Interposing) That does not answer the question. What do you mean by 'meeting the price?' Do you mean making the same price, making it lower or making it just a little higher?

• • •

The Witness: My answer would be if it was higher I would not be meeting his price.

By Mr. Wooden:

Q. If it were lower. A. If it were lower, my price would be lower than my competitors' price.

Q. Would you be 'meeting it' or 'beating it?' A. Well, I would be quoting a less price.

Q. You would not be meeting it; you used the term 'meeting.' I want to know what it means in your mind. A. Well, I have tried to make it clear, sir.

Examiner Norwood: That means making it the same; that is what you understand as meeting the price, is it not?

The Witness: Well, it might be so interpreted by anybody. (Tr. 5032-36)

• • •

The Witness: If I see a quotation of two dollars, if I want the business at that destination, then I will offer to meet that price. If I do not want the business at that destination I would not meet the price.

By Examiner Norwood:

Q. Well, to meet that price, you mean that you would make the same price, do you not? A. In order to meet that price, I would quote two dollars." (Tr. 5040)

ACKERMAN, Sales Manager, Lawrence:

"Q. Is the delivered price at the various stations where you deliver cement ordinarily the same as the delivered price there of your competitors? A. I trust so.

Q. Do you try to make them so? A. No, sir. Not necessarily. I want to get all I can get for our cement.

Q. You say you trust so? A. Well, yes, sir; I said I trust so.

Q. Do you expect them to be so? A. Well, if they are higher we won't get the business.

Examiner Norwood: Do you endeavor to reach the same price that your competitor quotes?

The Witness: In most cases, yes, sir." (Tr. 7131)

SUNDERLAND, President, Ash Grove:

"By Mr. Wooden:

Q. Mr. Sunderland, you frequently used the expression today of meeting competition at the destinations where you delivered your product. A. At the market place, yes, sir.

Q. You mean by that that you endeavor to make your delivered price the same as that of your competitors at the given destination? A. Well, we always endeavored to get the highest market price for our products.

[Italicized part quoted in Fdgs. Par. Six (b)]

Q. Does it mean that you endeavor to make your delivered prices the same as your competitors? A. We endeavor to meet.

Q. And by meeting them you mean making them the same? A. Well, we wouldn't want to discredit our product or be charged with being a chiseler by quoting a lower price.

Q. You think it would discredit your product if you sold a cent under the market at a given destination? A. I think it would unless that quotation was designed to reduce the market, but if it was designed to take advantage and get an order that we couldn't get at the market, then I would say we were chiselers and that the effect would be of that policy to discredit our materials and our claims for them. (Tr. 13694-95)

* * *

Q. You mean to say that as to cement; you can't sell cement for less than the market without discrediting it? A. As to our cement, yes, sir.

* * *

Q. You believe it would discredit your product if you sold it at just as good a quality but took less for it, do you? A. I believe it would be discredited in the minds of the buyers and our trade generally, yes, sir.

Q. If you got a better quality and a lower price, or as good a quality and lower price? A. I think it would tend to discredit our claims of higher quality because why, if our claims were true, would we sell it for less than the market.

Q. You just don't believe anybody can do such a thing as sell at less than others are selling it, is that right? A. Oh, no. I didn't say that. They do, but we don't.

Q. They shouldn't? A. Well, in my opinion they are digging their own grave industrially speaking." (Tr. 13694-97)

L. J. Capen, Vice President, Dewey:

"By Mr. Wooden:

Q. In other words, you don't want to have delivered prices in effect at any point that are less than

those of other concerns? A. Don't want to have them in effect that are higher.

Q. Well, you don't want them in effect that are lower, either, is that right? A. Yes, that is right.

[Italicized part quoted in Fdgs. Par. Six (b)]

Q. In other words, you want your delivered prices to be the same as those of your competitors? A. We want to meet competition.

Q. And you mean, by meeting competition, having the prices at given destinations the same as your competitors? A. Yes, sir." (Tr. 12678)

COOGAN, Vice President, Alpha:

[Italicized part quoted in Fdgs. Par. Six (b)]

"Q. You say you quote delivered prices because it enables you to meet competition. Aren't you interested in beating competition, or just in meeting it? A. I am interested in meeting the lowest price which I find in any given market.

Q. You are not interested in beating the lowest price that any competitor offers? A. No, sir; I am not.

Q. Is it your conception of competition that a competitor who has an advantage over another competitor, whether in freight or otherwise, should not use that advantage in his price? A. Mr. Wooden, you would not use that advantage very long, because the other man would meet whatever price you make.

Q. Well, regardless of that,—is it your conception of competition not to use an advantage that you have?

* * *

A. I certainly wouldn't want to give away all advantages that we had; I would like to retain some for our own company.

By Mr. Wooden:

Q. Does not competition sometimes require people to give away advantages that they would like to keep?

* * *

A. Well, of course, I only know about our own business.

By Mr. Wooden:

Q. Yes, in your experience, though, isn't that a fact?

• • •

A. I think that is up to each individual to make up his own mind whether that is necessary or not.

By Mr. Wooden:

Q. Well, haven't you had any experience in the cement industry where you have had to give up some advantage, or part of some advantage, because competition forced you to? A. Why, yes, there have been many times where we have had to meet competition which we did not originate, and which we did not like, but we were forced to meet it." (Tr. 24340-42)

On the same point, Fellows, Western Sales Manager of Alpha, testified:

"Q. That is the situation, isn't it? So that no one has an advantage over anyone, at a given destination; is that so? A. I wish it were that way. Any time I have an advantage, I want to take that advantage if I have geographical position—I want to take advantage of that geographical position, and get as much for my cement as I can.

Q. But you do not do it by cutting the lowest combination of base price plus freight? A. One mill cannot have an advantage over the other very long, because the other mill will come in and meet the competition so as to get some of that business.

Q. So it is your position that no one mill can beat another at its lowest delivered price? A. They can at a certain time but eventually it will get down to where you are meeting the lowest competition.

Q. Yes, and some mills may be kept out of the territory because the price gets too low, too? A. I have never seen that happen." (Tr. 25882)

W. R. Blair, Sales Manager, Southwestern at El Paso:

"Q. Now, Mr. Blair, with reference to your obtaining information from your customers, or otherwise, regarding prices being paid by your competitors or methods employed by your competitors, is it not your purpose in obtaining such information, so that you will be on an equal basis with your competitors and be able to make as favorable terms and at as low a delivered price to your customers as they?

• • •

A. Yes, because we could not sell cement unless we did.

By Mr. Wooden:

Q. Is it not also your purpose in obtaining such information not to go below your competitors or give more favorable terms than your competitors? A. Well, if we did that, it would not last very long.

Q. Then, your answer, I take it, is in the affirmative? A. Yes, because I would say that we would have an apparent advantage until the information could be gotten to our competitors, and they would meet the situation.

Q. I take your answer to mean that you get this information with the intention of not going below your competitors in prices or more favorable terms; is that right? A. Yes; I think it would be futile." (Tr. 39333-34)

Bowen, Vice President, Lehigh:

"Q. Have you not followed the policy generally of making your delivered prices at given destinations the same as delivered prices of your competitors? (Tr. 27109)

• • •

A. Where we quote I attempt to make them the same as the lowest quotation I find in the market, and I should like to explain, if I may, that I have discovered upon frequent occasions, in fact, I discover in most markets, that the competition is limited as to

the number of manufacturers who quote in the market.

Those manufacturers who are unwilling to continue in competition in the market do not quote the higher prices at which they might be willing to take business, but when they realize that their prices are not competitive; merely refrain from quoting.

Q. Is it the policy of your company not to make delivered prices that are lower than the delivered prices of your competitors? A. No, it is not our policy. Our policy is not as you describe it, and the test of it is that we have frequently made prices lower than our competitors, but as to those prices they remain low only until those of the competitors who remain in the market, have an opportunity to meet them.

Q. In what percentage of your present business are your prices lower at destination than the destination prices of your competitors? A. I don't think they are lower in any case, or, if they are, they are in an insignificant number of cases.

Q. You don't want to make them lower, do you? A. I have answered that question by saying that we frequently have made them lower, but whether they remain lower or not is governed by our competitors, not by ourselves." (Tr. 27112-14)

AFFLECK, former President Universal Atlas:

"Q. Did you see anything wrong about a manufacturer trying to increase his percentage of total business when the volume was coming down or at any other time? A. I do not see anything wrong about it, but the unfortunate thing about it is——

Q. They ought to do it by lowering prices? A. It is futile because, if he gets away with it, it is only for a brief period.

• • •

A. If I could have gotten a bigger percentage by lowering prices, I would have done it and I wouldn't have thought anything about its being wrong, but I wouldn't have gotten away with it more than momentarily.

Q. You don't think a competitor ought to attempt to increase his percentage of the total volume of business by lowering price? A. You asked whether I think he ought not attempt to.

If he is my competitor, I would say he ought not to attempt to increase my percentage.

Q. As a matter of fact, however, you thought about it you didn't attempt to increase your percentage? A. No.

Q. So your practice was the same? A. We formed——

Q. Your practice was the same no matter what you thought your competitors' practices were? A. Well, we had had the rapid shrinkage in the selling price, and we went along with it, of course, as we had to do and curtailed our operations drastically and waited for a better time.

Q. You said—— A. We knew perfectly well we couldn't increase our percentage of the total. Didn't try to.

[Italicized part quoted in Fdgs. Par. Six (b)]

Q. You think it is futile for competitors to attempt to change their percentage of the total business that is available to the whole group? [*A. I don't think my opinion as to whether it was futile or not is important. It just is futile.*]

Q. Well, why? A. Because he can't get away with it?

Q. In other words, you don't think it is possible for a concern that has ten per cent. of the business this year or last year to make it fifteen per cent. this year? A. Oh, I didn't mean to convey that idea. The fact of the matter is, our percentage of the total underwent quite a severe shrinkage. We didn't get our percentage in 1931 or two, and others got more.

[Italicized part quoted in Fdgs. Par. Six (b)]

Q. And others got more? [*A. So I should qualify that by saying it wasn't entirely futile. They could get by with a certain increase in percentage for a certain time but they soon ran out.*] I am glad you corrected me on that. I wouldn't want the—

Trial Examiner Norwood: They could do that with the method of giving secret prices?

The Witness: The secret really does not remain secret very long. (Tr. 34932-34)

* * *

[Italicised part quoted in Fdgs. Par. Six (b)].

[*Q. You don't mean to say, though, that you have no purposes of you own to serve in the making of identical delivered prices on the basing point system? A. Oh, no, I wouldn't deny that at all. On the contrary, I would say that I was committing suicide if I didn't do that,*] because——

Q. And—— A. On—Long experience has shown me that if my—if my competition takes the shape of a lower price of my commodity at the point of delivery, then the market price there, the market price will quickly become, under ordinary conditions that I have named, or the price of that some competitor has named.

Q. Well, if—— A. So I can't deny that I have a motive in not getting the price, the general market price down.

Q. In other words—— A. Provided it's on a fair level. And I think it has been.

Q. You have purposes of your own there that you'd like to serve regardless of whether your customers or dealers have purposes of their own that they arrived—that they served by it? A. No denying that, Mr. Wooden, self preservation." (Tr. 34947-48)

Brobston, President, Hercules:

"Q. You testified that it has been the policy of the companies that you have been connected with to make competitive prices, competitive delivered prices; is that correct? A. That is correct, yes.

Q. Do you mean by that making your delivered prices the same as that of your competitors? A. I make them as high as I can make them and still get the business, Mr. Wooden.

Q. And in doing that do you make them the same as your competitors? A. I do, because I couldn't get the business if I made them any higher.

Q. And you have never made them any lower? A. I think I outlined my policy to you, Mr. Wooden. It is a one-price policy to everybody. I don't make any secret rebates." (Tr. 26378-79)

HARTE, Vice President, North American:

"Q. Do you ordinarily make your delivered price at a given destination the same as the delivered prices of other mills at the same destination? A. Well, we usually try to obtain the most money we can for our product. We usually meet the competitive price that we are aware of.

* * *

The Witness: * * * the usual result, I would say in the majority of cases, to be honest, would be that they would be about alike with variance at times." (Tr. 7512-13)

And on cross examination by respondent counsel:

"Q. Mr. Wooden asked you whether you tried to quote the same price as your competitors. In your experience, if you sold cement at prices being quoted by your competitors, would that be the best available market price? A. That would be, I would say, the lowest available market price.

Q. And the best to you? A. The best to ourselves, yes.

Q. And it would be the best available market that you could obtain for your goods at that place? A. That is correct, sir.

Q. Can you get more than the market price at any destination? A. I have not been able to do it in thirty years." (Tr. 8256)

JENNINGS, former Sales Manager, Southwestern at Osborn:

"Q. • • • Did the desire to figure the same destination prices by using the same freight that your competitor was using enter into your use of the freight rate books at the Institute? A. Well, naturally, we wanted to have the right price, to quote the right prices, that was our business.

Q. In other words, you wanted to have the same destination price as your competitors? A. Well, I suppose so; we didn't want to be higher because we didn't want to lose the business.

Q. And you didn't want to be lower, either? A. We didn't want to be lower." (Tr. 11172-73)

LUCAS, Vice President, Petoskey:

"Q. Have you ordinarily found that the prices of various competitors are the same at given destinations as your own? A. No; we attempt to make ours the equivalent of the lowest one there, if we want to get any business.

Q. Can you name specific instances where you made different destination prices than your competitors? A. Yes; I think there was one introduced in the record here this morning, in Milwaukee, where our prices were not comparable to the lowest prices.

Q. Well, ordinarily, are not your delivered prices at given destinations competitive, as you call it, with those of your competitors? A. Ordinarily in marketing in this business we find it necessary to meet the lowest price quoted, in Milwaukee, if we want to stay in there. If we do not, we just do not quote there any more.

Q. And the same thing does as to the others; if they want to be competitive, they have to be as low as you? A. They have to be as low as the lowest one there.

• • •

Q. You frequently find that when a price changes, you are not low, and you then proceed to make yourselves low; is that it? A. That is right.

Q. As low as the others? A. Yes." (Tr. 38832-34)

PEARSON, Secretary-Treasurer, Cumberland:

"Q. When you speak about being competitive at various destinations with your prices, you mean, do you not, having your price there as low as the lowest? A. That is right.

Q. And I understand you have never taken the lead in either reducing or advancing the price at your mill? A. No, sir." (Tr. 39914)

RUSSELL, Vice President, Peerless:

"Q. Isn't it a fact that the method of quoting delivered prices that you have employed has been of importance to your company, in part, because of its enabling you to meet the delivered price of other competitors? A. If I understand your question correctly, this method of quoting prices is of importance to us just as any other method of quoting prices would be important to us.

We would have to know about it and how to use it.

• • •

By Mr. Wooden:

Q. In other words, it has no relation in your mind to the question of whether your delivered price is competitive with delivered price of competitors? A. I would not say that this is the best method, the simplest method, or the most complicated method.

• • •

Q. And you do not say that is of no importance to your company, do you? A. I did not say it was of no importance to our company.

Q. Would you say it is of some importance to your company, then? A. Certainly, any method.

Q. For that reason? For that reason? A. Not for that reason alone.

Q. In part? A. It is a part of the pricing system and, of necessity, must be important, in part.

Q. For that reason? A. For the reason to enable us to meet our competition?" (Tr. 34481-82)

WING, Vice President, Penn-Dixie:

"Q. When other mills come into that territory where you have that freight advantage, they meet your delivered price? A. They do if they want business or sell any.

Q. At any rate, they do not cut below it? A. Well, there have been cuts in the area made on our business.

Q. That is an exceptional thing, though, isn't it? A. No, it is not.

Q. Haven't you said that ordinarily the delivered prices are the same? A. Yes, ordinarily.

Q. That is, ordinarily the mills that come into your territory near by your mills do not cut below your delivered price at those points, do they?

* * *

The Witness: Ordinarily they meet our price.

By Mr. Wooden:

Q. They make their delivered price the same as yours? A. Ordinarily.

Q. And ordinarily, when you go into the territory where other mills have the freight advantage, you meet their price there on a delivered basis, do you not? A. We make the same price in order to get the business.

Q. You consider making a competitive price, making it the same, but not going below the other man at the delivery point, don't you? A. Absolutely." (Tr. 8161-62)

NEYLAN, General Sales Manager of Lone Star:

Examined for the Commission as to the reason for quoting to railroads f.o.b. mill, said the company knows that the "basis of the award is going to be the destination price, and we want our prices to be on an equal basis with the others. * * * We want to have an opportunity for competing for that particular business at destination."

"Q. And having your prices at destination the equivalent of all other prices at that destination? A. Or lower. We have done that.

Q. But your booklet[1] says you expect them to be identical? A. We are going to try to make them identical if we possibly can. However if we want the business very badly, we may go a bit better than identical." (Tr. 6183)

And at another point:

"Q. Ordinarily a mill that wants to cut price does not cut it very much in order to get the business, does it? A. Sometimes he does, sometimes he does not.

Q. It is not neecssary to cut very much, is it? One cent a barrel would do it? A. In some cases, yes.

Q. On large orders, wouldn't even a fraction of a cent do it? A. Yes, where a man is buying on price.

Q. And the States are buying on price, aren't they? A. To a great extent they were, yes." (Tr. 6259)

[Italicized part quoted in Fdgs. Par. Six (b)]

[1] This refers to Com. Ex. 1112, Lone Star Pamphlet on "Trade Ethics & Marketing Policies", which stated (p. 23):

"The price we actually quote any cement buyer is influenced by two factors: First — Our 'Base Price,' plus the freight charge from our mill to the customer's town; or Second — Our Competitor's 'Base Price,' plus the freight charge from his mill to the customer's town. In the first instance, our 'Base Price' is the *maximum* return which we receive even in those towns which, due to their location, enjoy a lower freight rate from our mill than from our competitor's mill. *In the second instance, as we cannot get more than our competitor's price, we quote a price which we expect will be identical with that asked by the competitor whose lower freight rate gives his product the advantage at that point. It is equally simple to anticipate the competitor's price at any definite point, just as it is for any competitor to anticipate ours. This usually results in identical quotations being submitted by several manufacturers at a given time and place.*"

H. C. Koch, Vice President, Lone Star was questioned as to his conception of competition, as follows:

> "Q. Is it your conception of competition that unless your delivered prices are the same as those of your competitors you are not meeting competition?
>
> • • •
>
> A. If my price at destination is not the same as my competitors, I am not meeting competition. If my price was lower, I would get the business. If my price was higher, I would not.
>
> *By Mr. Wooden:*
>
> Q. In other words, you think that in order to have competition, your delivered prices have got to be the same as your competitors'; is that right? A. No. No. That is one form of competition.
>
> Q. You can have competition with the same delivered prices, and you can have it with different; is that right? A. Yes.
>
> Q. Isn't your conception of price competition that of matching the delivered prices of your competitors? A. I think I used that word 'matching' in the Texas case, but that would not—that is one form.
>
> Q. Well, you did testify in the Texas case, then, didn't you, that you construed the word 'competition' as matching prices? A. In other words, what I meant by that, Mr. Wooden, was that is one form of competition." (Tr. 33160-61)

Mr. Koch admitted that he testified as follows in an antitrust suit in Texas:

[Italicized part quoted in Fdgs. Par. Six (b)]

> "'*Q. What is your definition of competition on a price basis? And your answer: A. I always construed the word "competition" as matching prices, or in placing yourself in a position to solicit an order on a standardized product on an equality with the other man'.*" (Tr. 33161)

TWAMLEY, Vice President, Coplay:

Asked if he aimed to make his delivered prices the same at any given destination that competitor's make at those points answered "we aim to meet competition in the territory where we intend to do business" and that if he made it higher he "would be out of the market."[2]

J. E. BATES, Sales Manager, Federal:

> "When I quote a price to any customer I am supposing—I assume that our prices will be as low. If we don't receive the particular piece of business I won't know what the condition is until after I have checked it.
>
> • • •
>
> The only assurance that we have that our price is identical with competitors is when customers are giving us business in the market." (Tr. 30840)

DAWSON, Vice President, Medusa:

In explaining Medusa's use of delivered prices to Governor Horner of Illinois by letter in 1933 J. B. John, President of the Company among other things said "if we bid a mill price, to that we would have added the freight to the various destinations."[3] Vice President Dawson of Medusa was asked by Commission Counsel why his Company took that stand.[4] Dawson said "the letter itself answers the question" but pressed by the Trial Examiner for a further statement he added:

> "Well, • • • he figured in bidding f.o.b. mill he was afraid he would not be competitive in price"

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[2] (C) Tr. 6762.

[3] Com. Ex. 1895 A-B. See full text in Sec. B, 3, c, pp. 193, 194, *supra*.

[4] (R) Tr. 40400.

The examination continued as follows:

"Q. And when you say that he was afraid, and you adopt that as your answer also—afraid he would not be competitive in price—do you mean to say he was afraid he would not make his price—the same as his competitors? A. No; he had no means of knowing what the lowest price would be.

Q. But if any of the others quoted the same price, he would want to quote the price they did; is not that correct. A. No; not necessarily.

Q. What would he want to quote in a case like that? A. The lowest possible price that we could find in that market.

Q. And you would not want to quote any lower than that? A. If we could find a price lower there, we would meet it.

Q. Yes; but not lower than any price you could find? Is that what you mean by being competitive? A. No; by meeting the lowest price that is in existence.

Q. When you say 'by meeting the lowest price that is in existence,' you mean not making one lower than the lowest one. A. Not if we could help it.

Q. And if the lowest one happened to be the same as all the others, of course you would mean, then, to make a price the same as your competitors; is that correct? A. We do not know what our competitor is going to bid.

Q. You stated if you quoted f.o.b. mill that you would not know what they were going to bid, and you could not be competitive. Is that our understanding of your answer of a few minutes ago? A. Not quite in that same form.

Q. Well, you form it again for us. A. I will put it this way: Asking us to bid, as they did in this case, on a very large quantity of cement, we would not be in a position to find out what the low price would be in any particular point of destination where the cement is going to be used.

Q. You mean the quotations of your competitors? A. Well, I would not say the quotations of our competitors, as much as any one of them.

Q. Any one quotation of your competitors? A. Any low one.

Q. Of your competitors? A. We find out what it is, if we possibly can, so as to meet that lowest price.

Q. And that was the reason you would not bid f.o.b. mill? A. In that particular case it was, because it was a large quantity of cement involved.

• • • •

It was a large quantity of cement involved, and you are either in or out, one or the other. You had no chance to get a portion of the business. If you are low you get all of it. If you are high, you are out completely." (Tr. 40402-04)

D. The Use of Basing Points.

1. General

Cement prices in most areas usually reflect a recurring figure at some mill plus the rail freight charges to the various destinations.[1] The recurring figure so reflected at any given time is variously referred to as a "base price," "price base" or "maximum net." The mill at which the base price is reflected is referred to as a base mill.[2]

Hogan, then Vice President of Lone Star testified before the Interstate Commerce Committee of the Senate in 1936, as follows:

[Italicized part quoted in Fdgs. Par. Seven (f)]

"The Chairman: All the members of the Cement Institute use the basing-point system, do they?

Mr. Hogan: Yes.

The Chairman: They all use the basing-point system?

[1] See evidence set out below.

[2] Sweeney, Vice President, Edison (R) Tr. 35645.
Elcock, Vice President, Southern States (R) Tr. 37603.
Bowen, Vice President, Lehigh (R) Tr. 26614-15.
Warren, G. E., Vice President, Southwestern (R) Tr. 28834.
Sunderland, President, Ash Grove (C) Tr. 13589-90, 13638-39.

Mr. Hogan: So far as I know. You do not mean that they all have basing prices? They do not have.
The Chairman: How is that?
Mr. Hogan: They do not all have basing prices."[3]

Brooke, Vice President of Monarch, asked by Commission counsel what he understood by the "basing point system" testified:

> "I will say it is pretty much of a misnomer. In the first place, there isn't very much system to it; and it is more of a mill net that you have to take into consideration in arriving at what you think might be the lowest delivered price at destination. There might be many of those mill bases. They come and go, and they might attempt to figure prices on a mill this week that we disregard next, depending on how they quote the public, how we determine from information we get as to how they are doing it."[4]

[Italicized part quoted in Fdgs. Par. Seven (f)]

Reiter, Vice President of Universal Atlas testified that "*ordinarily the • • • commercial destination price • • • is the lowest sum of any base price plus the applicable commercial freight rate.*"[5]

Ackerman, Vice President of Lawrence ventured a "guess" that in 1939, 75% of his company's business was "sold at points at which a base price of a mill is reflected"[6] that in that year, outside of New York, Long Island, Westchester and a dozen or more other cases all Lawrence's prices were related to basing points[7], but that in other years "there have been many many more" excep-

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[3] Com. Ex. 2878 M.

[4] (R) Tr. 42376-77.

[5] (C) Tr. 3749.

[6] (R) Tr. 31296.

[7] (R) Tr. 31303.

tions and a great deal larger percentage of prices which did not reflect a base.[8]

Hoenig, Nebraska's sales manager testified that some prices do and some do not reflect a base, and that "on a great many prices they are in such confusion that it is difficult to say how they might have been fixed"[9] (Tr. 42015-16).

The testimony by executives of cement companies as to the extent of the existence of the "base plus freight" pattern in their respective selling areas is shown in the tabulation below:

Company	Extent of Base Plus Freight Pattern	Witness
Alpha	Majority of instances ((R) Tr. 23051, 25853-55)	Coogan, Vice President Fellows, Sales Manager
Consolidated	Majority of cases ((R) Tr. 47614-15)	Storey, President
Edison	Generally, except in "arbitrary zones" ((R) Tr. 35809-11) All do not ((R) Tr. 35644)	Sweeney, Vice President
Federal	Usually ((R) Tr. 30580) Some ((R) Tr. 30828)	Bates, J. E., Sales Manager
Florida	Majority of cases ((R) Tr. 47614-15)	Storey, Vice President
Hawkeye	Usually ((R) Tr. 41615, 41865, 41881-82) Seldom not traceable ((R) Tr. 41895)	Manley, General Manager
Hercules	Generally, but may times not ((R) Tr. 26083-84)	Brobston, President
Hermitage	As a general rule in vast majority of cases ((R) Tr. 36345-46) but not always ((R) Tr. 36340-41)	McGovern, Sales Manager

[8] (R) Tr. 31305.

[9] (R) Tr. 42015-16.

Company	Extent of Base Plus Freight Pattern	Witness
Keystone	Customarily (Resp. Ex. 1415 F: Wheeler-Hearings)	Scott, H. M., President
Kosmos	Sometimes, but find lower than that at many points ((R) Tr. 36810) Usually ((R) Tr. 36812)	Horner, President
Lawrence	Sometimes yes, sometimes not ((R) Tr. 31223, 31202-03) Usually ((R) Tr. 31316)	Ackerman, Vice President
Louisville	All, except some special prices at a particular point ((C) Tr. 13237-38)	Hill, Vice President
Lehigh	Most cases but not all ((R) Tr. 27107-08) Many markets where do not ((R) Tr. 26672-73)	Bowen, Vice President
Medusa	Sometimes ((R) Tr. 40047-48, 40056)	Dawson, Vice President
	At many points, usually but sometimes not ((R) Tr. 37122-23) Most, but not all ((R) Tr. 37427)	Alexander, President
Monarch	Practically all published prices ((R) Tr. 42383) Sometimes do not ((R) Tr. 42191-92, 42388-89)	Brooke, Vice President
Nazareth	Generally ((R) Tr. 28394-95)	Robeson, Vice President
Nebraska	Most published prices ((R) Tr. 42173-74)	Hoenig, Sales Manager
North American	Majority of cases ((C) Tr. 7512-13) Sometimes ((C) Tr. 8260-61)	Harte, Vice President

Company	Extent of Base Plus Freight Pattern	Witness
Northwestern States	Usually ((R) Tr. 36482)	MacDonald, B. A., Vice President
Peerless	Always appears in some areas ((R) Tr. 34345)	Russell, Vice President
Penn-Dixie	Not always; 20 to 60% did not in 1932-33 ((R) Tr. 38144-45)	Browder, Traffic Manager
Petoskey	At many points usually ((R) Tr. 38748) Very frequently ((R) Tr. 38793)	Lucas, Vice President
Pittsburgh	Sometimes ((R) Tr. 37692) Usually ((R) Tr. 37693-94)	Letzkus, Sales Manager
Signal Mountain	Majority of cases ((R) Tr. 47614-15)	Storey, Vice President
Southern States	About 98% do; 20-25% of contractor sales ((R) Tr. 37644-45)	Elcock, Vice President
Trinity	Majority of cases ((R) Tr. 47614-15)	Storey, Vice President
West Penn	Majority of cases ((R) Tr. 27929)	McKee, Vice President
Wolverine	Sometimes ((R) Tr. 35903-04)	Nelson, J. L., Vice President

In 1931 the Commission canvassed the cement industry with a questionnaire which among other things asked each company to "name the basing point or points used in determining the delivered prices of cement sold and shipped from each plant" and to state the "price f.o.b. plant and at each basing point" on January 1, 1929, together with all changes and dates of change.[10] Forty-one respondent com-

[10] Answers to these questionnaires (or letters sending information in connection therewith) are in evidence for 53 respondents and for 9 non-respondent companies located east of Washington, Oregon and California.

panies[11] and six non-respondents[12] furnished basing points in response to this question. Thirteen respondent com-

[11] References are to Com. Exs.
* Indicates gave no prices except for own bases.

Alpha: 3152 O-P
Arkansas: 3176 N
Bessemer: 3168 D-F, J
Castalia: 3121 E-F
Dewey: 3150 E-F
Diamond: 3139 D
Edison: 3114 C-G
Georgia: 3116 C
Giant: 3125 E-H
Glens Falls: 3147 B-C
Hawkeye: 3142 C, E-F
Hercules: 3144 C, E
Huron: (lists own bases only) 3155 B
Idaho: (own base) 3171 C
Keystone: 3146 C
Kosmos: 3153 C-D
Lawrence: 3126 D-E, H-I
Lehigh: 3143 G-I
Lone Star: 3182 F, 3183 F, 3184 D, 3185 H, 3186 H, 3187 E-G
Medusa: 3118 P-Q, W-Y
Missouri: (lists own bases only) 3117 J-K
*Monarch: 3119 B-C
National: 3115 C
Nazareth: 3127 F, I
Nebraska: 3176 X
North American: (lists own bases only) 3124 D
Northwestern States: 3175 B-C
Peerless: 3170 C-D
Penn-Dixie: 3135 J-K
*Petoskey: 3123 D
Pittsburgh: 3133 E-F
Southern States: 3160 B
Standard: 3169 C-D, F
Three Forks: 3176-2 H
Universal Atlas: 3141 E, J
Volunteer: 3165 B-C
Vulcanite: 3128 C-F, I-J
Wabash: 3148 C
West Penn: 3134 D-G, J-K
Whitehall: 3164 C
Wolverine: 2829 A

[12] Allentown: 3149 C, E.
Ideal: 3176 H, 2 T.
Louisville: 3130 D.
Michigan Alkali: 3131 C.
Republic: 3145 C.
Southern: (uses Birmingham only) 3162 B.

panies[13] and two non-respondents[14] did not furnish any list. The answers of these companies insofar as they explained their failure to furnish lists of bases follow:

MARQUETTE:[15]

"We do not now and never have quoted or established any f.o.b. prices at any of our mills. All prices which we quote customers are delivered prices and these delivered prices are determined in all instances after considering all of the factors applicable to the territory for which a quotation is to be made. These factors include cost of manufacture, supply and demand, competitors prices and transportation costs. Having never had an f.o.b. price, at our mills, we consequently had none on January 1, 1929 and likewise your inquiry as to any changes since that date is not applicable in our case."

ASH GROVE:[16]

"The basing point, or points, used depend upon point, or points, of delivery. Full explanation of our methods of determining delivered prices, whether

[13] Ash Grove: 3122 B.
Colorado: Refers to Ideal, 3176 R.
Cumberland: 3132 C.
Great Lakes: Refers to Lehigh, 3151 C.
Hermitage: 3120 C.
Marquette: 2610 B.
Oklahoma: Refers to Ideal, 3176 BB.
Southwestern: 3154.
Superior: (Wellston Iron Furnace) 3139 C.
Trinity: 3158.
Union: Refers to Ideal, 3176 LL.
Utah: 3137 C.
Valley Forge: Refers to Allentown, 3138 C.

[14] San Antonio: 3161 B-C.
Standard Lime & Stone: 3159 C.

[15] Com. Ex. 2610 B.

[16] Com. Ex. 3122 B.

submitting sealed bids or making open prices, is set out at length in our letters April 22, 1930, May 2nd, 1930, and January 12, 1931, addressed to Francis Walker, Chief Economist, in response to his inquiry of like nature."

In the letter of April 22 referred to, Sunderland, President of Ash Grove wrote:

"The average price per barrel realized on all shipments from our Chanute, Kansas, cement mill during January, *1920*, was $2.1510 per barrel. This price was a composite of all prices realized, which vary according to where the individual shipments go and the competition to be met at each point of delivery.

* * *

The above price includes shipments made far and near. The above price was, as stated, our average realized price at our mill, i.e., f.o.b. cars Chanute, Kansas. Delivered prices would, of course, include the freight from Chanute to destination. Such delivered prices are determined by our competition, which we must meet, if we get any business; therefore, in order to get any business, we realize less for our cement shipped to some points than to others, for the obvious reasons that we pay higher freight rates from our mill to some points of destination than to others, and our delivered prices *are determined* by our 'destination competition' and not by the freight rates we pay. It will be equally obvious that we might have to ship a long distance on a high freight rate to a point to which some competitor's mill might have to ship only a short distance on a lower freight rate; and while, if we met the competition the delivered prices would be the same, each mill would pay different freight rates and, therefore, realize different prices at their respective mills.

We had only one mill in January, 1920, to-wit, at Chanute, Kansas. Our mill at Louisville, Nebraska, did not go into production until May, 1929. The present prices at each of our mills vary accord-

ing to destination of shipments and the competition met.

In general I might add: The term 'base price' as applied to cement is a misnomer, since in practically every instance it amounts to merely 'a maximum price' above which the mill or company establishing it does not ask; but seldom, if ever, would the average realized prices on all shipments during any day or any month be as much as,—or, in fact, have any relation to,—the so-called 'base price.'

This Company,—and I assume every other company,—determines for itself the maximum price it expects to get, and the minimum price it is willing to accept, f.o.b. its mills, for its product; and the actual prices realized in such circumstances would vary all the way between the minimum and the maximum according to the competition met at all destinations to which shipments are made.". (Com. Ex. 2416 A-B)

CUMBERLAND:[17]

"The producing capacity of our plant is less than four tenths of one percent (.004-) of the total cement producing capacity of all mills located in the United States and is less than four percent (.04-) of the producing capacity of mills in the Southeastern territory, within which our plant is located, consequently our possible volume of business is so small as to preclude the possibility of establishing and maintaining prices based at our plant throughout the territory to which we ship so, therefore, it has always been our policy to meet the lowest price known to us to be offered by our competitors at any destination to which we desire to ship. Insomuch as we have never used our own shipping point for price basing and having, from time to time, changed our prices at each destination to which we might ship only after having learned through our salesmen or by contact with our customers of a change in price offered by our competitors, we are therefore unable to accurately state the several basing points

[17] Com. Ex. 3132 C.

affecting the hundreds of destinations within the territory served by us as of certain given dates, and we are unable to advise the exact dates and amounts of such price changes established by our competitors."

HERMITAGE:[18]

"Our mill has never been a basing point; we meet competition as we find it. There are quite a good many basing points throughout the country that affect the prices in the southeast. These are changed from time to time, and while we try to keep up with the present basing points through our traveling representatives and dealers whom we do business with, as soon as basing point is changed or eliminated, we keep no further record of it. The only records we have at present are basing points we use in making delivered prices. Of course, if delivered prices, taking our freight rate into consideration are too low, we do not accept business in the territory."

SUPERIOR:[19]

Wellston Iron Furnace Co., predecessor of Superior, answered:

"We have our salesmen in the field who call on Dealers and Contractors. They are instructed to ascertain the price per barrel on Portland Cement in each town they solicit. They ask the Dealer to see the latest quotation he has received, or a copy of invoice, and they immediately call our office and give us price in question. We then check the freight rate of the Company making the quotation to the destination in question and figure their base, and to make prices, we add to the base price, the freight, cost of package, to determine the delivered price.

We meet this price if it is attractive to us; if not attractive, we do not quote."

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[18] Com. Ex. 3120 C.

[19] Com. Ex. 3129 C.

TRINITY:

No answer to the questionnaire for this company is in evidence, but in a letter dated January 28, 1932 to the FTC the Company said:

> "We are unable to give you base prices f.o.b. our mills after April 17th for the reason that the base price of mills North and East of us was reduced to such an extent that we were unable to maintain a base price and have since been obliged to meet the price established by such mills shipping into this territory."[20]

SOUTHWESTERN:[21]

> "We want to be helpful in the findings you desire, and we must reiterate that we make our price based on the last known quotation made. Our records themselves verify this statement."

UTAH:[22]

> "No basing point."

The answer then goes on to list the "price per barrel in cloth sacks f.o.b. plant" at various dates from January 1, 1929 to May 1, 1932.

SAN ANTONIO:[23]

> "We have five travelling men in the field and they obtain from us from our customers and from the trade the price at which cement is being offered by competing mills and we either meet it or refuse to meet the price. From this information our traffic man figures out what our competitors are charging at the mill."

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[20] Com. Ex. 3158.

[21] Com. Ex. 3154: Follow up letter to Questionnaire.

[22] Com. Ex. 3137 C.

[23] Com. Ex. 3161 B.

And in a letter to an attorney examiner of the Commission on January 22, 1932, San Antonio said "we have no mill base, but try to meet competition as we find it."[24]

STANDARD LIME & STONE CO.:[25]

> "This company uses in determining delivered prices on cement to any particular destination, the competition existing at such destination. As this company has no mill base price, the freight from whatever price per barrel happens to be the competition at any particular point would have to be deducted in order to ascertain the mill price to our company. This figure would be the same to only a few destinations or those which happen to take the same competitive delivered price, and to which destinations the rate of freight from our plant would be the same."

At different times in various sections of the country prices lower than any "base plus freight" have existed. These are often referred to as "arbitraries." The places and areas of "arbitrary" prices are shown on Map #II-I, p. 562, *infra*. The evidence as to such points, their extent and nature is collected in Section E, *infra*.[26] The pattern found in a given area often varies from time to time with changing circumstances in the market or area concerned.[27]

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[24] Com. Ex. 3161 C.

[25] Com. Ex. 3159 C.

[26] Pp. 557-599. And see Section C, pp. 254-269, *supra*, as to Secret Price Cuts.

[27] Alexander, President, Missouri (R) Tr. 37428-29.
Brooke, Vice President, Monarch (R) Tr. 42381-83, 42388-89.
Browder, Traffic Manager, Penn-Dixie (R) Tr. 38487-88, 38144.
Cronkrite, Vice President, Universal Atlas (C) Tr. 13534.
Koch, Vice President, Lone Star (R) Tr. 33076.
Lucas, Vice President, Petoskey (R) Tr. 38819-21.

Thus the President of Missouri testified that the prices at most destinations would reflect a "base at some cement shipping point plus freight from that point" but that Missouri had "established prices" "which would not be a combination of so-called mill base and freight rate", citing St. Louis, and a "good many destinations in the Metropolitan District of Kansas City" where "we are selling cement for less than so called mill base plus freight."[28] He testified further that he did not have in mind any other particular points where this was so, but

> "I remember it varied from time to time, in the various territories the delivered prices have had no relation to so-called mill bases."[29]

Brooke, Vice President of Monarch, said he "would not say it was a rule" that he finds prices at destination are the lowest combination of some base plus freight and although "practically all" of Monarch's "published prices" are a "combination of some mill net and freight rate",[30] he had published prices which were not so determined, recalling Oklahoma City "several years ago",[31] and the Kansas territory in about 1936 where quotations from the Bonner Springs plant "did not relate to the base freight rate."[32]

Meyers, Traffic Manager, Huron (R) Tr. 33488-89.
Resp. Ex. 2011 A-E.: Memo, Calvin, President, Aetna to Johnson, Aetna 4/20/38.
Neylan, Asst. General Sales Manager, Lone Star (C) Tr. 6530-31, 6592, 6598-99.
Postelle, Sales Manager, Alpha (R) Tr. 24965-66.

[28] Alexander, President, Missouri (R) Tr. 37427-28.

[29] Id., Tr. 37429.

[30] (R) Tr. 42381, 42383.

[31] (R) Tr. 42383.

[32] (R) Tr. 42388-89.

Asked to recall other instances he said "I do not try to remember all those things * * * those details of the past".[33]

Browder, Traffic Manager of Penn-Dixie said he could not name "all of the specific points" where Penn-Dixie's prices have not been the equivalent of the base price plus rail freight but could give "quite a number of areas" specifying Florida,[34] "various ones around New York, Baltimore, Boston, Providence, and various other inland towns" including East Ithaca, N. Y., Fort Des Moines, Iowa, and "various prices of that kind around our mill at Kingsport at one time".[35]

Vice President Dawson of Medusa testified to the existence "at times" of a "flat price" for Allegheny County, Pa.[36]

Lucas, of Petoskey cited "zone prices in Michigan[37] and "occasional zones around cities" where "it does not bear any relationship to rail rates" like Detroit, Wayne County and "what we call the Thumb District".[38] These were the only exceptions to the base plus-freight pattern "but they are quite predominant. You would be surprised how many there are."[39]

Meyers, Huron Traffic Manager, testified that there is a "more or less arbitrary price for the Metropolitan District of Cleveland for truck delivery" which has existed "off and on for years" as far back as 1930.[40]

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[33] (R) Tr. 42389.

[34] (R) Tr. 38487.

[35] (R) Tr. 38487-88.

[36] (R) Tr. 40253.

[37] (R) Tr. 38819.

[38] (R) Tr. 38820.

[39] (R) Tr. 38821.

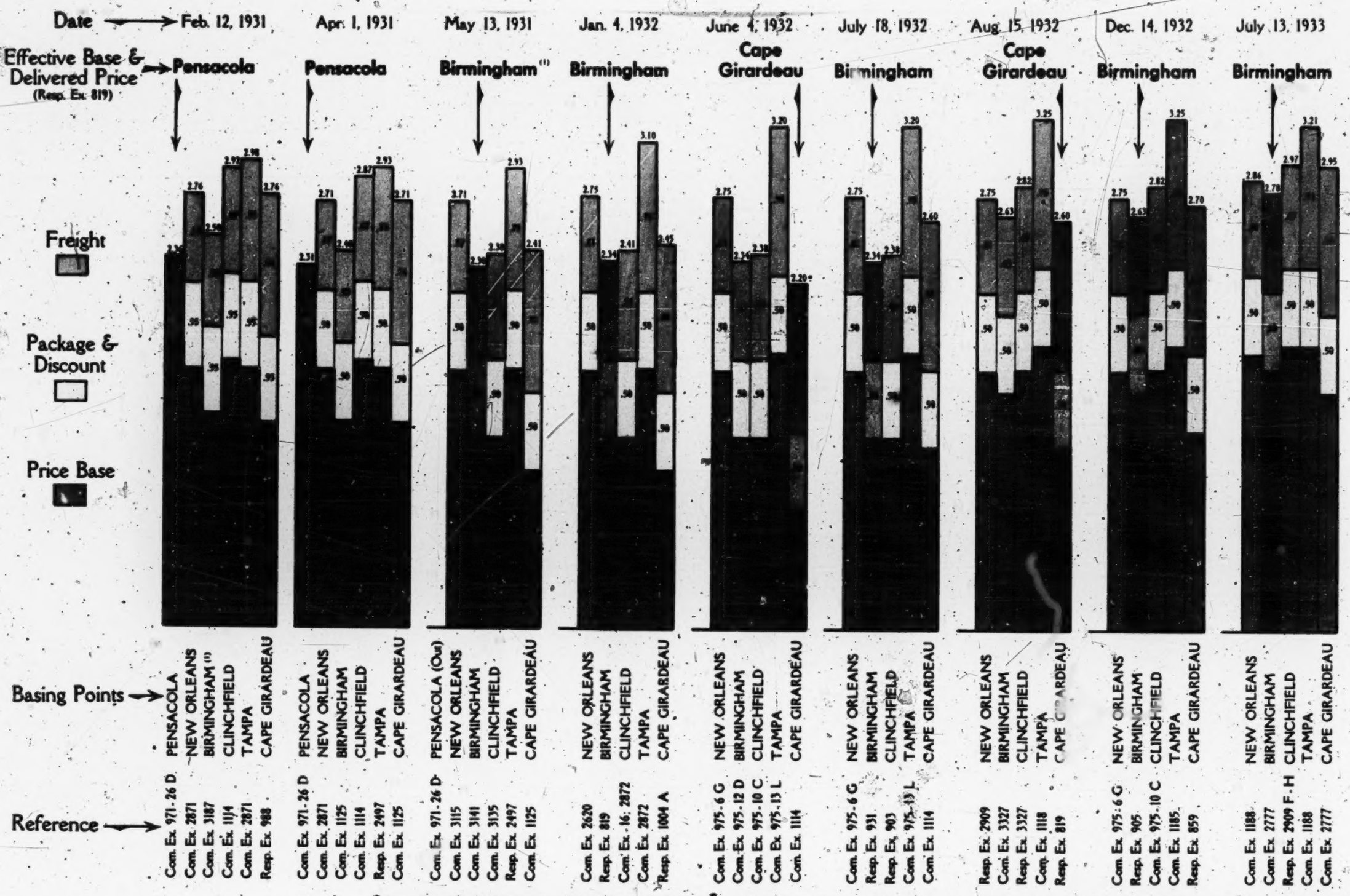
[40] (R) Tr. 33488-89.

Other examples and illustrations of openly quoted prices which do not reflect basing points plus freight rates are set out in Part II, E on Arbitrary Prices,[41] and see also Part VI, E relating to Truck Prices.

In those cases where delivered prices reflect the sum of some price base plus transportation charge to the destination, changes in price bases in the area or in freight rates will often cause the effective base to shift. Thus while the delivered price at a given point may at one time reflect Base A plus freight, at some other time it may reflect Base B or Base C plus freight, depending upon changes in the price bases or freight rates. This is illustrated in the case of Pensacola, Florida by Chart #II-A on page 350 where over a period of seven years four different bases were effective in making the price at Pensacola.

There is no cement plant at Pensacola but it is a port of entry for foreign cement. On several occasions a company has established a base figure at Pensacola for the purpose of meeting the competition of imported cement moving inland. This happened in 1931 and the delivered price for cement at Pensacola from February through April of 1931 was the Pensacola base of $1.81 plus the package and discount charges. As shown on Chart #II-A the nearest base mill freightwise to Pensacola was New Orleans but its base of $1.64 plus a freight rate of 57 cents would make a price 40 cents higher than the Pensacola base. The next nearest mill to Pensacola, Birmingham, Alabama, at that time had a base of $1.36 per barrel and a 59 cent freight rate which would have made a delivered price at Pensacola of 14 cents higher than the Pensacola base. As shown on the chart this continued until May 13, 1931 at which time the base at Pensacola was eliminated

[41] See p. 557.



* Resp. Ex. 819 is Alpha's price card for Pensacola. The low delivered price and the effective base in each instance is that used by Alpha according to Resp. Ex. 819. All freight rate with Resp. Ex. 2244 (Emergency Freight Applications). Price bases other than the "effective base" in each instance are taken from the exhibits noted on the chart opposite the hea discount is 10¢ per barrel except on February 12, 1931 when the discount was 15¢ per barrel (Tr. 25470; Resp. Ex. 819). Beginning on December 7, 1936 the 15¢ freight charge at P

(1) Resp. Ex. 819 shows a base at Leeds. Birmingham and Leeds are a so-called "group base" having the same freight rates beyond a certain distance. The Leeds rate to Pensacola a

Chart II - A

July 13, 1933 — Birmingham

NEW ORLEANS	Com. Ex. 1188
BIRMINGHAM	Com. Ex. 2777
CLINCHFIELD	Resp. Ex. 2909 F-H
TAMPA	Com. Ex. 1188
CAPE GIRARDEAU	Com. Ex. 2777

Oct. 1, 1933 — Birmingham

NEW ORLEANS	Com. Ex. 911-E
BIRMINGHAM	Resp. Ex. 499
CLINCHFIELD	Resp. Ex. 2909 F-H
TAMPA	Com. Ex. 1188
CAPE GIRARDEAU	Com. Ex. 2777

June 4, 1935 — Birmingham

NEW ORLEANS	Com. Ex. 2366
BIRMINGHAM	Resp. Ex. 981
CLINCHFIELD	Com. Ex. 2366
TAMPA	Com. Ex. 2366
CAPE GIRARDEAU	Com. Ex. 192

Oct. 29, 1936 — New Orleans

NEW ORLEANS	Com. Ex. 1185
BIRMINGHAM	Resp. Ex. 901
CLINCHFIELD	Com. Ex. 1111 C
TAMPA	Com. Ex. 1066
CAPE GIRARDEAU	Com. Ex. 1066

Dec. 7, 1936 — Pensacola

PENSACOLA (In)	Com. Ex. 586-4 L
NEW ORLEANS	Com. Ex. 1213
BIRMINGHAM	Resp. Ex. 978
CLINCHFIELD	Com. Ex. 309
TAMPA	Com. Ex. 1213
CAPE GIRARDEAU	Com. Ex. 1066

Jan. 1, 1937 — Pensacola

PENSACOLA	Com. Ex. 1213
NEW ORLEANS	Com. Ex. 1213
BIRMINGHAM	Com. Ex. 1213
CLINCHFIELD	Com. Ex. 586-4 M
TAMPA	Com. Ex. 1213
CAPE GIRARDEAU	Com. Ex. 1213

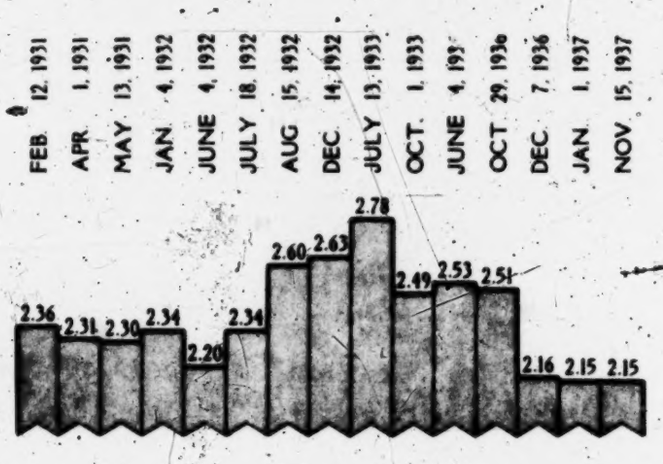
Nov. 15, 1937 — Pensacola

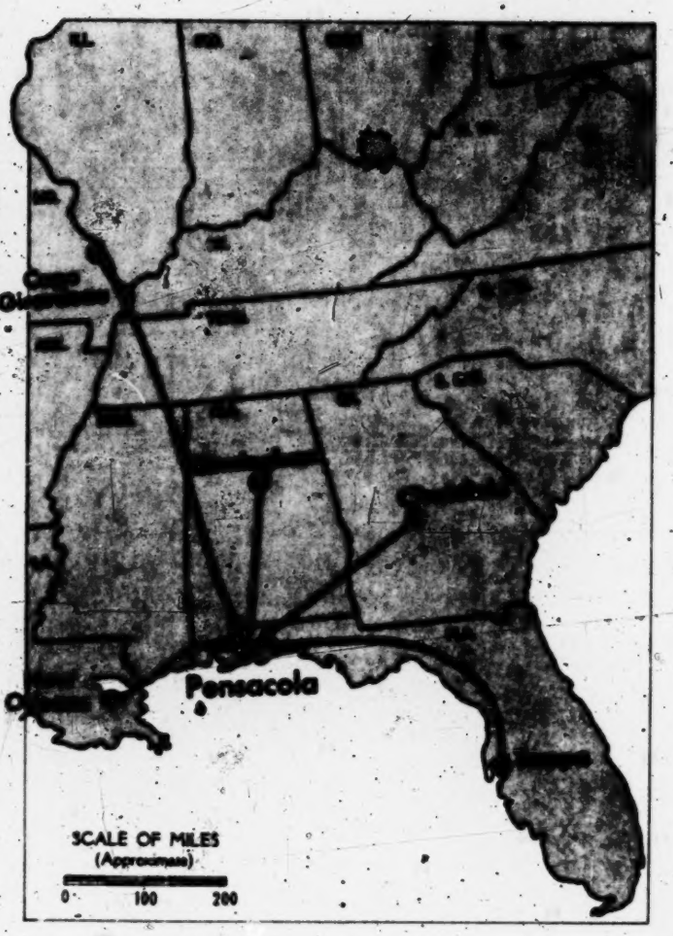
PENSACOLA	Com. Ex. 1213
NEW ORLEANS	Com. Ex. 1213
BIRMINGHAM	Resp. Ex. 1199
CLINCHFIELD	Resp. Ex. 1199
TAMPA	Com. Ex. 1213
CAPE GIRARDEAU	Resp. Ex. 1041

. Ex. 819. All freight rates shown are taken from Resp. Ex. 819 and/or Com. Ex. 1110 C (Florida Rate Book No. 1) in conjunction
e chart opposite the heading "Reference". The charge for package is 40¢ per barrel in cloth and 15¢ per barrel in paper and the
e 15¢ freight charge at Pensacola represented the minimum line haul rate (Resp. Ex. 1296, Com. Ex. 1952).

eeds rate to Pensacola as shown on Resp. Ex. 819 is always 2¢ per barrel higher than the Birmingham rate.

RELATIVE DELIVERED PRICES AT PENSACOLA ON DATES SHOWN





and at the same time the base at Birmingham had dropped to $1.21 as against $1.36 in February. Thus the Birmingham base plus freight was the lowest price quoted at Pensacola beginning in May 1931 and continuing, despite a 4 cent increase in the freight rate from Birmingham, until June 4, 1932. The nearer mill at New Orleans used a base which was so much higher than Birmingham that despite its freight advantage of 2 cents per barrel it was ineffective as a price factor at Pensacola.

On June 4, 1932, however, Marquette's base at Cape Girardeau was reduced to 75 cents per barrel. This base became the effective base at Pensacola despite a 95 cent freight rate because the Birmingham base remained at $1.21 and the New Orleans base remained at $1.64, both with freight added, making a delivered price considerably higher than the Cape Girardeau base plus freight. The further sequence of changes in price bases and freight rates thereafter and the shift from one base to another is shown on the chart.

Pensacola was re-established as a base in December 1935 and it again then made the lowest delivered price at Pensacola. At that time instead of quoting the base price, at Pensacola the company initiating the price move, used the base plus the minimum line haul freight rate then in effect and the mill bases at Birmingham and New Orleans were eliminated as a price factor in the Pensacola market.

The chart also shows in a recapitulation the fluctuation in delivered prices at Pensacola at the dates given.

2. The Origins of Basing Points

The evidence concerning the development of the use of Northampton, Pa. in the Lehigh Valley as the earliest basing point in the cement industry and the establishment of

other basing points in the West has already been referred to briefly in connection with the origins of delivered prices.[1]

a. Northampton—First Basing Point

In 1900, the Atlas plant at Northampton, Pennsylvania, also called Navarro, was the largest cement mill in the country.[1] Joseph Brobston, President of Hercules and a Lehigh Valley cement manufacturer since 1900, described how Northampton became the first basing point when he was associated with the Dexter Portland Cement Company.[2] Dexter held a contract with Samuel H. French & Co., by which it undertook to market the entire output of the Dexter plant. This agent resold the cement to distributors and in certain territory, himself acted as a distributor.[3] Under the arrangement with French & Co., Dexter made a price at the mill below which French could not resell without consulting Dexter. The agent never sold above that price, but on the other hand, Dexter was frequently asked by him to permit a lower price in order to enable him to meet competition at destination.[4] This contract provided that, when freight to destination from the Dexter mill was higher than freight from the neighboring Atlas mill at

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[1] Affleck, B. F., former President, Universal Atlas, Com. Ex. 2878 K-L, Wheeler Committee Hearings.
Coogan, F. M., Vice President, Alpha (R) Tr. 23096-112.
Koch, H. C., Vice President, Lone Star (R) Tr. 32650 *et seq.*
Nelson, J. L., Vice President, Wolverine (R) Tr. 35874 *et seq.*
Smith, B. S., President, Universal Atlas, former President, Penn-Dixie, Com. Ex. 2878 D;
Resp. Ex. 3745 B: Wheeler Committee Hearings.

[1] Brobston, President, Hercules (R) Tr. 26071-72.

[2] (C) Tr. 10540-41.

[3] Brobston, *supra*, Tr. 26005-06.

[4] Id., Tr. 26069-70.

Northampton, Dexter would absorb the difference.[5] Dexter could not have sold its cement unless it met the competition of competitors at destination.[6] By thus limiting the net return which it could get for its cement, Dexter used Northampton as a basing point[7] wherever it, plus freight, made the lowest delivered prices.[8] Bowen, Vice President of Lehigh, testified that as each new plant began operating, upon application, the railroads gave them the same rates as Northampton.[9] Coogan and Brobston testified that since no mill in the Lehigh Valley group having equal freight rates could secure more for its cement than any other mill within the group, this had the effect of causing the group to become known as the Lehigh Valley base as early as 1903.[10] There is evidence that the formal grouping of identical rates from all Lehigh Valley mills to a blanket area beginning some twenty miles out did not take place until after 1920.[11] The map on page 354 is Resp. Ex. 2895 for identification, which was not admitted in evidence, but respondents have moved to adduce it.[12] It was prepared by D. S. Browder, Traffic Manager of Penn Dixie[13] and is a map of the Lehigh Valley District showing the location of the cement mills in that district, and the territory

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[5] Brobston, President, Hercules (R) Tr. 26070.

[6] Id., Tr. 26069-70.

[7] Id., Tr. 26071-72, 26436-37.

[8] Id., Tr. 10566.

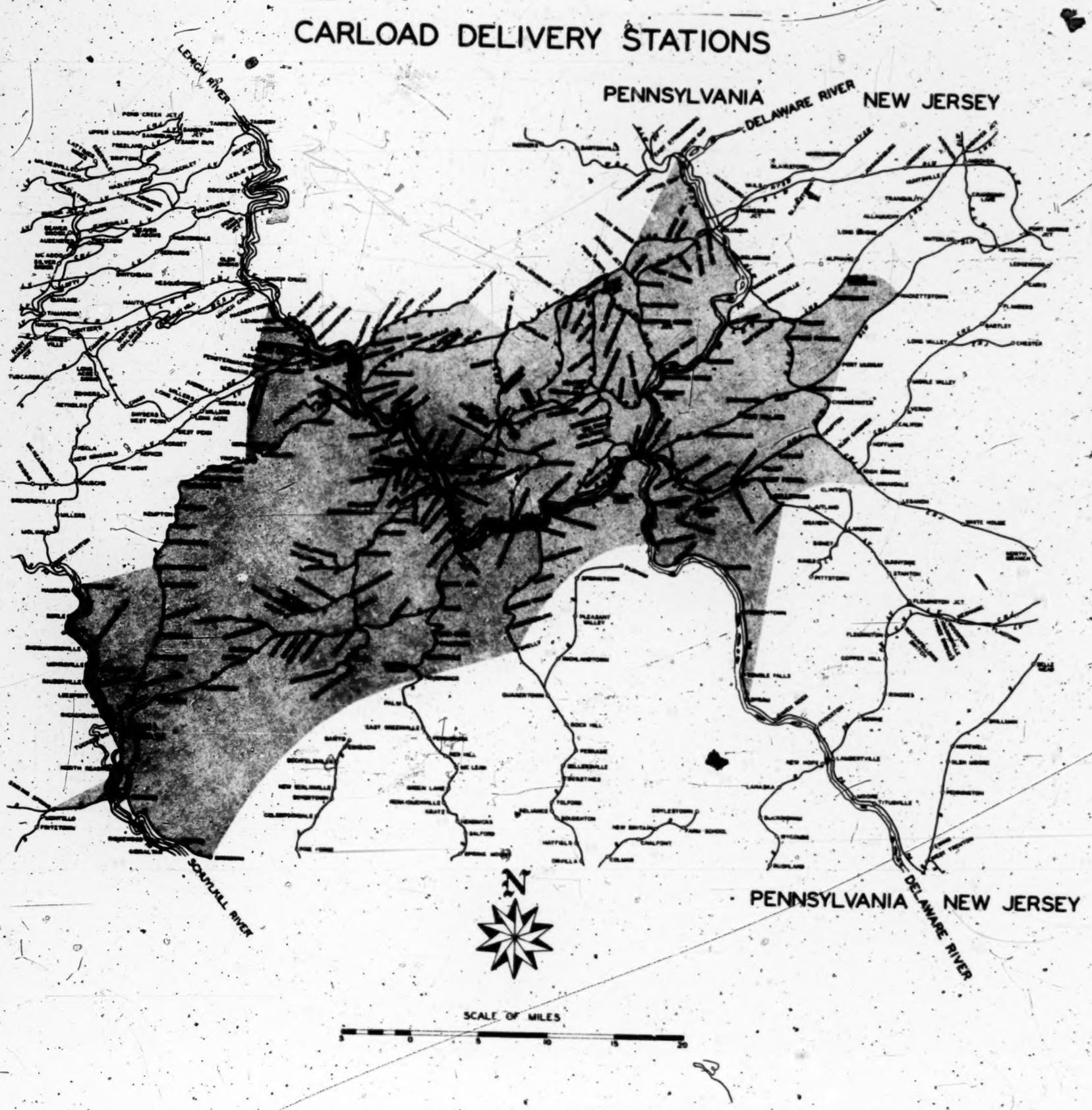
[9] Bowen, Vice President, Lehigh (R) Tr. 26674-75.

[10] Coogan, Vice President, Alpha (R) Tr. 23992.
Brobston, *supra*, Tr. 26076-77.

[11] Browder, Traffic Manager, Penn-Dixie (R) Tr. 38078-81, 38555.
Cole, Traffic Manager, Medusa (R) Tr. 41322-28, 41444-45.
Barrett, Vice President, Lehigh Valley R.R. (C) Tr. 48260-63.

[12] Motion for Leave to Adduce Additional Evidence, p. 32.

[13] (R) Tr. 38061-62.


CARLOAD DELIVERY STATIONS
PENNSYLVANIA
DELAWARE RIVER
NEW JERSEY
LEHIGH RIVER
SCHUYLKILL RIVER
PENNSYLVANIA
NEW JERSEY
DELAWARE RIVER
N
SCALE OF MILES
0
5
10
15
20

[shaded area] in which lower freight rates are applicable from one or more mills than from the other mills. To all points outside the red boundary [shaded area] the freight rates from all the mills are the same.[14]

As the center of the country's cement production, the Lehigh Valley was the only basing point in use for a number of years.[15] Even after the advent of other basing points the Lehigh Valley base plus freight was used in many parts of the South and West.[16]

b. Hannibal and Iola Become Basing Points

At first, new mills in sections of the country outside the Lehigh Valley usually quoted delivered prices which were the equivalent of the mill prices plus freight quoted by the Lehigh Valley mills.[1] This compelled the Lehigh Valley mills to quote delivered prices or mill prices with freight stated in order that customers could compare delivered costs.[2] The Valley mills used the mill prices they quoted

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[14] Browder, Traffic Manager, Penn-Dixie (R) Tr. 38059.

[15] Coogan, Vice President, Alpha (R) Tr. 24510-11, 24532, 23102-03.
Resp. Ex. 455; Com. Ex. 425, p. 9, Com. Ex. 2878 K, L;
Resp. Ex. 3743 A-B: Testimony of B. F. Affleck, Wheeler Hearings.
Com. Ex. 2878 D: Testimony of B. S. Smith, Wheeler Hearings.

[16] Lehigh Valley used in vicinity of Manheim in 1909.
Coogan, *supra* (R) Tr. 23099.
Koth, Vice President, Lone Star (R) Tr. 32650-51, applied in South in 1907-1908.
Nelson, J. L., Vice President, Wolverine (R) Tr. 35875-79, applied in western Pennsylvania in 1908, see Brobston, President, Hercules (R) Tr. 26438.
Affleck, President, Universal Atlas (R) Tr. 34797-98.
Hanahan, President, Volunteer (R) Tr. 38614.

[1] Coogan, *supra*, Tr. 23103-04, 23096-97.

[2] Coogan, *supra*, Tr. 23103-04.

to their distributors as the basis for their delivered prices,[3] and as it has been shown above, these mill prices tended to be equal and came to be known as the Lehigh Valley base. In the beginning, delivered prices throughout the country tended to equal the Lehigh Valley base plus freight from the Lehigh Valley to destination.[4]

When the Atlas Company constructed a large plant at Hannibal, Missouri in 1901, it announced that it would quote delivered prices only on shipments from this mill. Originally, these prices were equivalent to the Lehigh Valley base plus freight to destination, but competition from other new western mills soon induced Atlas to make Hannibal a basing point.[5]

About this time several mills were built in eastern Kansas in order to take advantage of cheap, natural gas and they became known as the Gas Belt mills.[6] A situation similar to that existing in the Lehigh Valley developed among these mills. The grouping of rates from Gas Belt mills began almost immediately after the construction of the first mill in the district in 1900, at Iola, Kansas. As other mills were built the carriers gave them the same rates as the Iola mill.[7]

In the beginning, these mills sold at delivered prices which were the equivalent of the Lehigh Valley base or the Hannibal base, plus freight, whichever was lower.[8] The in-

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[3] Bowen, Vice President, Lehigh (R) Tr. 26631-37.

[4] Coogan, Vice President, Alpha (R) Tr. 23101-02.
Koch, Vice President, Lone Star (R) Tr. 32650-51.
Nelson, J. L., Vice President, Wolverine (R) Tr. 35875-79.

[5] Com. Ex. 2878 K-L.
Resp. Ex. 3743 A-B.
Affleck testimony at Wheeler Hearings.

[6] Id.

[7] Moore, R. W., Vice President, Dewey (R) Tr. 47379.

[8] Resp. Ex. 3743 A-B.

creased competition among these mills became "so keen that prices fell off the bases of Northampton and Hannibal" and the third basing point was established at Iola.[9]

The exact dates that each of these bases were established is not clear in the record. There is evidence, however, that it was prior to 1909. The record clearly shows that Hannibal preceded Iola as a base[10] and Koch, Vice President of Lone Star testified that Iola was a basing point when he returned to the Gas Belt in 1909.[11]

(Maps Nos. II-B and II-C[12] on pages 359 and 360 show the state of the industry in terms of mills and basing points at the close of the years 1900 and in 1910 as shown by the evidence. Thus at the end of 1900 there were 38 cement mills in operation; none of them bases, and at the end of 1910 there were 108 mills, 3 of which were base mills. A circle having a radius of 50 miles has been drawn around each base mill on the 1910 map (and on all succeeding maps) in order to show which non-base mills are located within 50 miles of some base. In 1910 as shown on map #II-C it appears that there were 32 mills located within 50 miles of a base.)

c. Other Early Basing Points

Upon discovering that Portland cement of an excellent quality could be manufactured in the midwest, the Lehigh

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[9] Com. Ex. 2878 L.
Resp. Exs. 3743 A-B, 3745 B.

[10] Footnotes, 5-7, *supra*.

[11] (R) Tr. 32632.

[12] The citations to the record for the data shown on these maps and the later ones, #II D-G, *infra*, are collected and tabulated at the end of this Section.

Company established a plant at Mitchell, Indiana, in 1902, in order to cope with the growing demand for cement. Although this mill and Lehigh's Lehigh Valley plants cooperatively endeavored to serve the western territory,[1] the demand continued to mount so rapidly that Lehigh constructed a second mill at Mitchell in 1906.[2] Soon thereafter there was an enormous increase in mills within this area.[3] Finally, some time after the new Universal plant near Pittsburgh began selling in 1908, a Lehigh Valley company reduced its prices in the Pittsburgh area and henceforth applied a dual Lehigh Valley base using a lower figure for all destinations west of a line running north and south, east of Pittsburgh.[4] Spurred by the intensity of competition from the various new local mills, Lehigh made Mitchell a base in an effort to exclude Lehigh Valley mills from this market area.[5] The earliest reference to this base in the evidence is 1910[6] but other evidence shows its first use in 1912.[7] In that year Bowen stated that Lehigh also made its newly constructed Mason City, Iowa, mill a basing point.[8]

Koch, Vice President of Lone Star, indicated that sometime between 1907, and when he returned to Kansas in

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[1] Bowen, Vice President, Lehigh (R) Tr. 26563-65.

[2] Id., Tr. 26575-76, 26673-74.

[3] See Map No. II-C, p. 360, *infra*.

[4] Nelson, J. L., Vice President, Wolverine (R) Tr. 35878.
Coogan, Vice President, Alpha (R) Tr. 24510.

[5] Bowen, *supra*, Tr. 26673-74.

[6] Com. Ex. 3235 Z55-56: Minutes of PCA Meeting in June, 1910.

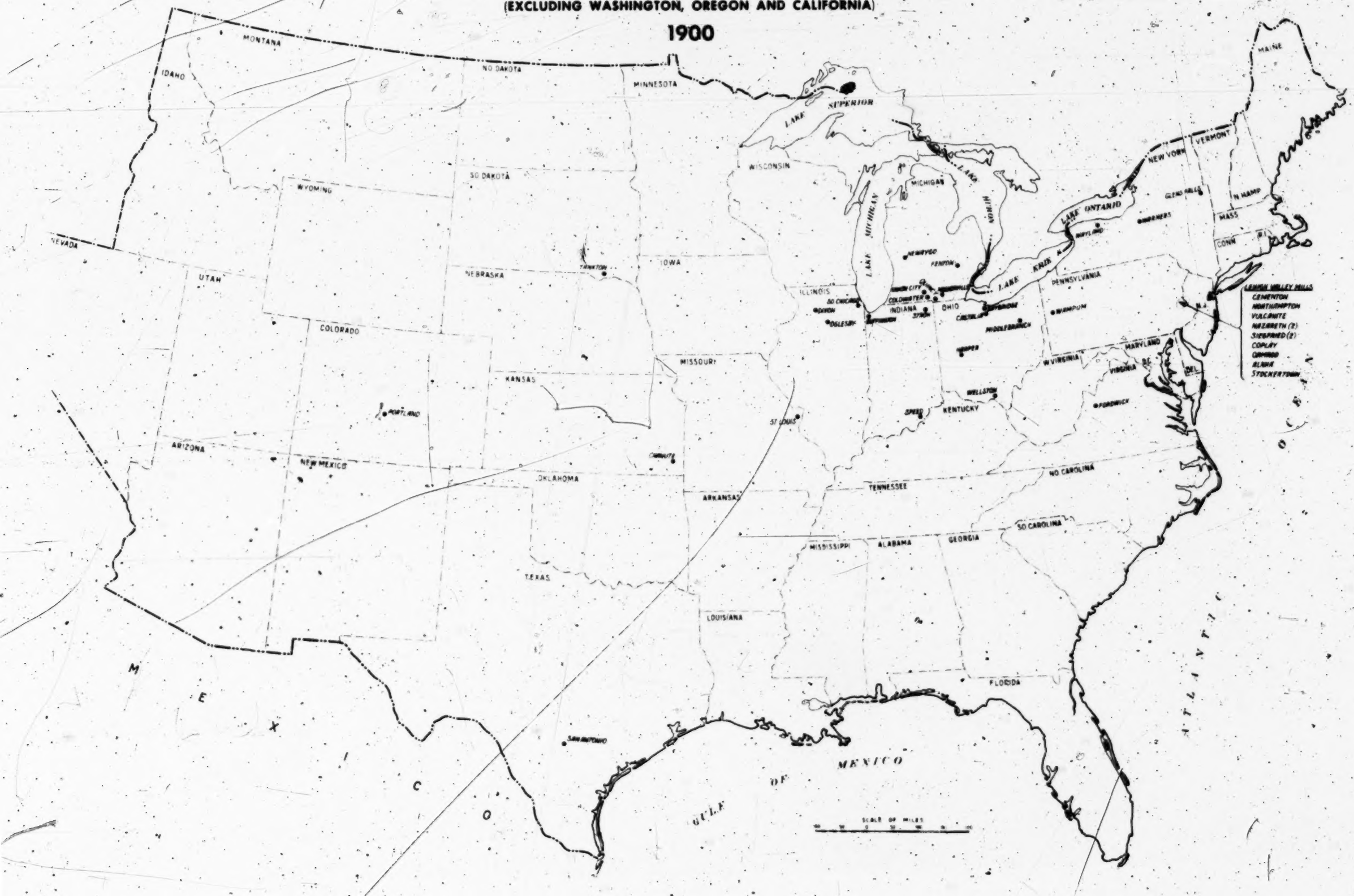
[7] Nelson, *supra*, Tr. 35884.
Resp. Ex. 455: List of basing points used by Alpha from 1903 to 1938.

[8] Bowen, *supra*, Tr. 26678-79.

PORTLAND CEMENT PLANTS IN THE UNITED STATES

(EXCLUDING WASHINGTON, OREGON AND CALIFORNIA)

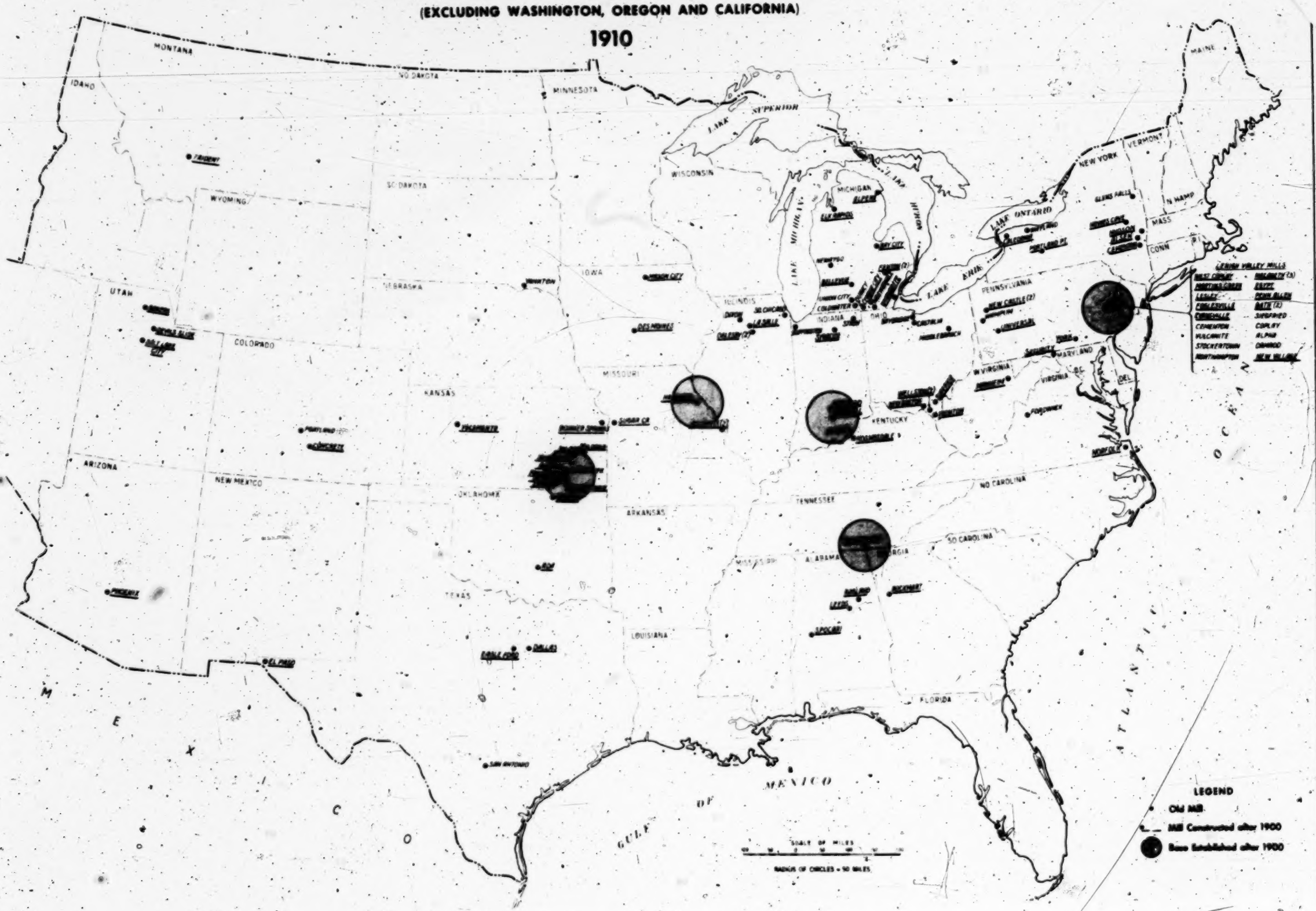
1900



PORTLAND CEMENT PLANTS IN THE UNITED STATES

(EXCLUDING WASHINGTON, OREGON AND CALIFORNIA)

1910



1909, the Dixie Portland Cement Co. had begun to use the Richard City, Tenn. mill as a basing point.[9]

The records of Universal's Pittsburgh office show a great frequency of price changes and methods of calculating prices in Western Pennsylvania and Ohio between 1910 and 1914.[10] These records reveal that Manheim, W. Va. and New Castle, Pa. were used temporarily as bases early in 1912[11] and that Stroh, Indiana, was first used as a basing point on June 5, 1912.[12] The Universal mill near Pittsburgh was made a base in October, 1913, ending the so-called dual base in the Lehigh Valley.[13] During the period 1910 to 1915 eleven new mills were built and fifteen existing mills were abandoned, so that by the close of 1915 there were 104 mills and as shown on the accompanying map (¶II-D, p. 364) 75 of these were bases or within 50 miles of a base.

3. The Growth of Basing Points and the Changing Status of Mills

The Commission found (Fdgs., par. 7(b)):

> "The number and identity of base and non-base mills change from time to time. A base mill may, for reasons its management considers sufficient, become a non-base mill, and, similarly, a non-base mill may become a base mill."

This finding is accepted.[1] John J. Porter, President of North American said "there may be changes in a base

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[9] Koch, Vice President, Lone Star (R) Tr. 32632.

[10] Nelson, J. L., Vice President, Wolverine (R) Tr. 35875-91. Resp. Ex. 2609 A-Z64.

[11] Nelson, *supra*, Tr. 35885-86.

[12] Id., Tr. 35885.

[13] Id., Tr. 35890.

[1] See testimony of the following:

at any time."[2] F. M. Coogan, Vice President of Alpha testified that "because a mill is a non-basing point today doen't mean it is not going to be a basing point tomorrow".[3] E. W. McGovern, Hermitage sales manager, said that the normal number of bases that affect his territory "varies from day to day".[4]

The evidence shows a steady growth in the number of base mills and a strong trend toward a constantly increasing number of basing points.[5] This growth and trend is

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Alexander, President, Missouri (R) Tr. 37122-23.
Bowen, Vice President, Lehigh (R) Tr. 26673-74.
Brobston, President, Hercules (R) Tr. 26085-86.
Browder, Traffic Manager, Penn-Dixie (R) Tr. 38144.
Colburn, Vice President, Marquette (R) Tr. 39035.
Coogan, Vice President, Alpha (R) Tr. 25839.
Dawson, Vice President, Medusa (R) Tr. 40050-51.
McGovern, Sales Manager, Hermitage (R) Tr. 36344.
McKee, Vice President, West Penn (R) Tr. 27704-05, 27861-62.
MacDonald, B. A., Vice President, Northwestern States (R) Tr. 36482.
Manley, General Manager, Hawkeye (R) Tr. 41616-17.
Moore, R. W., Vice President, Dewey (R) Tr. 47381.
Neylan, Asst. General Sales Manager, Lone Star (C) Tr. 6629-30.
Porter, President, North American (R) Tr. 33819.
Robeson, Vice President, Nazareth (R) Tr. 28014, 28018.
Warren, G. E., Vice President, Southwestern (R) Tr. 28785.

[2] (R) Tr. 33819.

[3] (R) Tr. 25839.

[4] (R) Tr. 36344.

[5] Bowen, *supra*, Tr. 26673.
Brobston, *supra*, Tr. 26077-78.
Coogan, *supra*, Tr. 23240.
Dawson, *supra*, Tr. 40053-56.
Koch, Vice President, Lone Star (R) Tr. 32633-36.
McGovern, *supra*, Tr. 36344-45.
Warren, *supra*, Tr. 28798.
Wing, Vice President, Penn-Dixie (C) Tr. 8131-32.
Resp. Exs.: 455 (Bases used by Alpha through the years).
457 (Bases used by Alpha revised to 9/26/38).
1109 A-D (Bases used by Lehigh Nov. 1939).

illustrated in the maps on pages 365-368 showing the number of base mills in existence in 1920, 1925, 1937, when the complaint was filed and in 1940 at the close of the hearing. Thus at the close of 1920 there were 107 mills in operation, 75 of which were base mills or located within fifty miles of a base. Between 1920 and 1925 19 new mills started operations and 3 mills were abandoned, and thus in 1925 there were 123 mills, 81 of which were base mills or located within fifty miles of a base.

At the time of the complaint in 1937 there were 139 mills. Twenty-seven were put into operation since 1925, but 11 existing mills had been abandoned. In addition, for the first time, as shown on Map #II-G, bases were established at some of the silos or packing plants, such as Cleveland and Toledo, Ohio and Buffalo, New York. At this time the estimated total capacity of the 139 mills, exclusive of California, Oregon and Washington, was 224,395,000 barrels per year.[6] Ninety-nine mills, with a capacity of 179,485,000 barrels or 80% of the total capacity were located at or within fifty miles of a base mill or silo.

At the close of 1940 there were still 139 mills in existence, one new mill having started operation and one existing mill having been abandoned, since 1937. Instead of 99 mills which were base mills or within 50 miles of a base, there were now 112 with a capacity of 192,609,000 barrels or 86% of the total.

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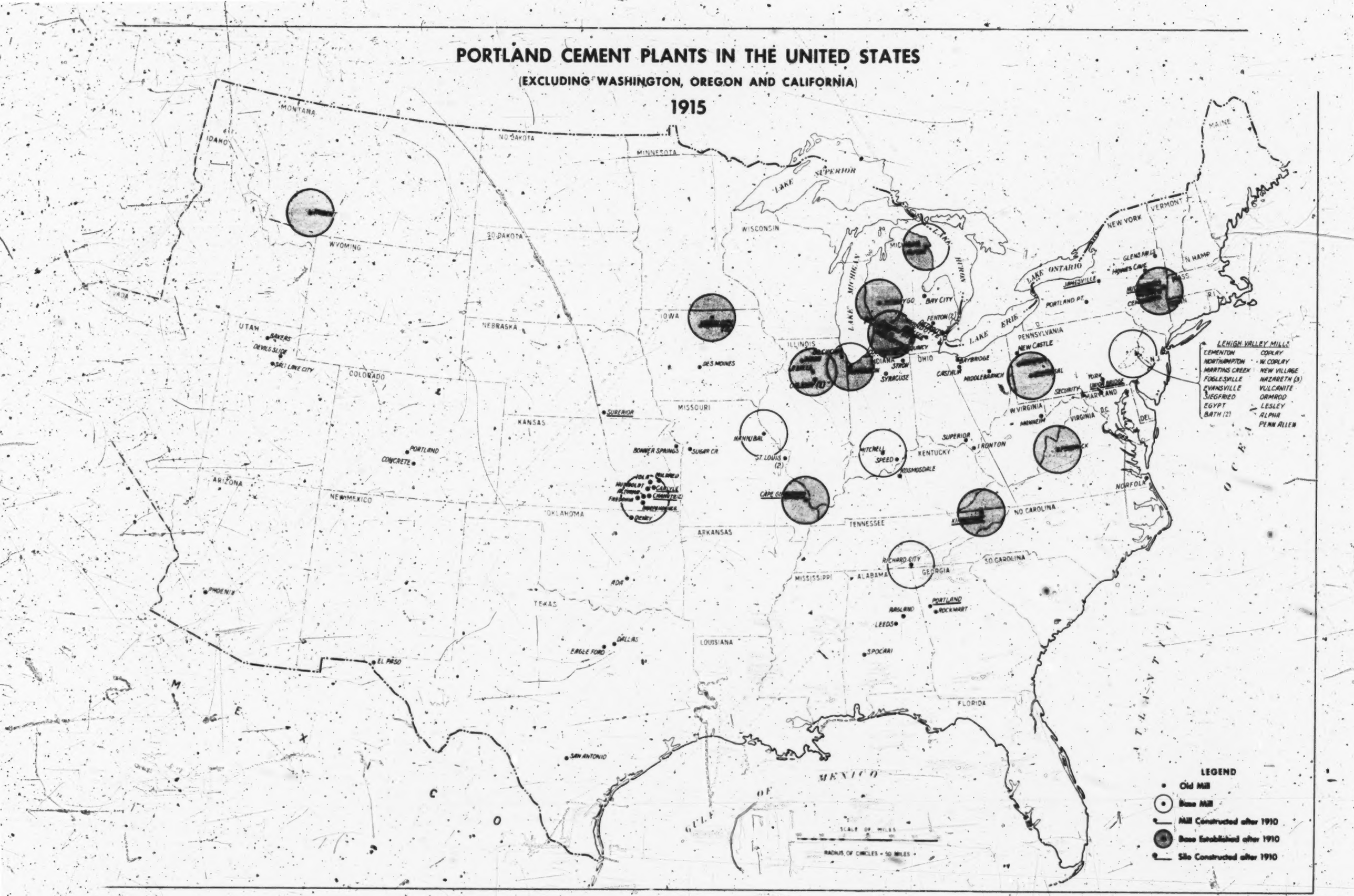
[6] Com. Ex. 3205: Mallory Statistics on Estimated Clinker Capacity for 1936-1938, Districts #1-12.

PORTLAND CEMENT PLANTS IN THE UNITED STATES

(EXCLUDING WASHINGTON, OREGON AND CALIFORNIA)

1915



LEHIGH VALLEY MILLS

CEMENTON	COPLAY
NORTHAMPTON	W COPLAY
MARTINS CREEK	NEW VILLAGE
FOGELSVILLE	NAZARETH (3)
EVANSVILLE	VULCANITE
SIEGFRIED	ORMROD
EGYPT	LESLEY
BATH (2)	ALPHA
	PENN ALLEN

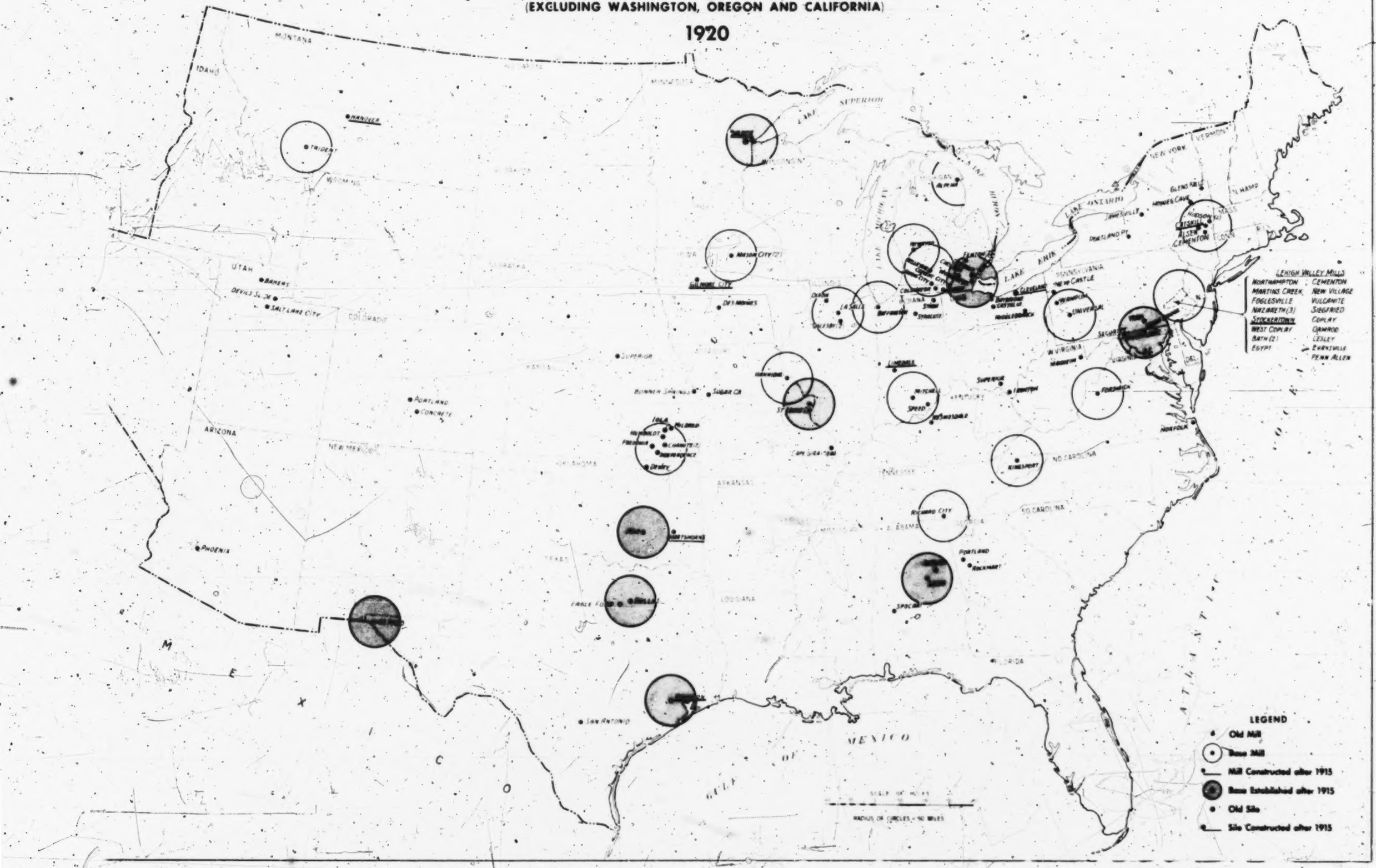
LEGEND

- Old Mill
- Base Mill
- Mill Constructed after 1910
- Base Established after 1910
- Silo Constructed after 1910

PORTLAND CEMENT PLANTS IN THE UNITED STATES

(EXCLUDING WASHINGTON, OREGON AND CALIFORNIA)

1920



PORTLAND CEMENT PLANTS IN THE UNITED STATES

(EXCLUDING WASHINGTON, OREGON AND CALIFORNIA)

1925

MONTANA
IDAHO
NO DAKOTA
MINNESOTA
WYOMING
SO DAKOTA
NEBRASKA
UTAH
COLORADO
KANSAS
IOWA
MISSOURI
ILLINOIS
WISCONSIN
MICHIGAN
INDIANA
OHIO
KENTUCKY
TENNESSEE
ARKANSAS
OKLAHOMA
TEXAS
LOUISIANA
MISSISSIPPI
ALABAMA
GEORGIA
SO CAROLINA
NO CAROLINA
VIRGINIA
W VIRGINIA
PENNSYLVANIA
NEW YORK
VERMONT
MAINE
N HAMP.
MASS.
CONN.
R.I.
N.J.
MARYLAND
DEL.
ARIZONA
NEW MEXICO
FLORIDA
LAKE SUPERIOR
LAKE MICHIGAN
LAKE HURON
LAKE ERIE
LAKE ONTARIO
ATLANTIC OCEAN
GULF OF MEXICO
MEXICO

TRIDENT
DULUTH
MASON CITY (2)
GILMORE CITY
DES MOINES (2)
MILWAUKEE
BAY CITY
DETROIT
ALPENA
PETOSKEY
OTTAWA
LA SALLE
OGLESBY (2)
COLUMBUS
STRUTHERS
CLEVELAND
HIGHLAND
MIDDLEBRANCH
PORTLAND PT.
LONG ISLE
GLENS FALLS
HOOSAC
CATSKILL
ALSEN
CEMENTON
HOPE
NAZARETH (3)
NORTHAMPTON
MARTINS CREEK
ORMROD
NEW VILLAGE
STOCKERTOWN
VALCONTE
PENN ALLEN
LESLEY
SIEGFRIED
CEMENTON
FOGELSVILLE
COPLEY
EMMAUS
WEST COPLEY
BATH (2)
EGYPT
NAZARETH (3)
NORTHAMPTON
MARTINS CREEK
ORMROD
NEW VILLAGE
STOCKERTOWN
VALCONTE
PENN ALLEN
UNIVERSAL
SECURITY
YORK
HANOVER
MARYLAND
NORFOLK
HANNIBAL
ST LOUIS (2)
CAPE GIRARDEAU
SPEED
FRANKFORT
MIDDLEBORO
FORDWICK
KINGSPORT
NASHVILLE
RICHARD CITY
ADA
PHOENIX
EL PASO
SAN ANTONIO
HOUSTON
PORTLAND
ROCKMART
LEEDS
SPOCARI
CHATTANOOGA
MIDLOTHIAN
DALLAS
PARIS
PRESIDIO
CHANUTE
OKLA CITY
SALT LAKE CITY
OPHIR
TOOELE
IDAHO
MONTANA
WYOMING
COLORADO
NEW MEXICO
ARIZONA
UTAH
NEVADA

SCALE OF MILES
0 50 100 150
RADIUS OF CIRCLES = 50 MILES

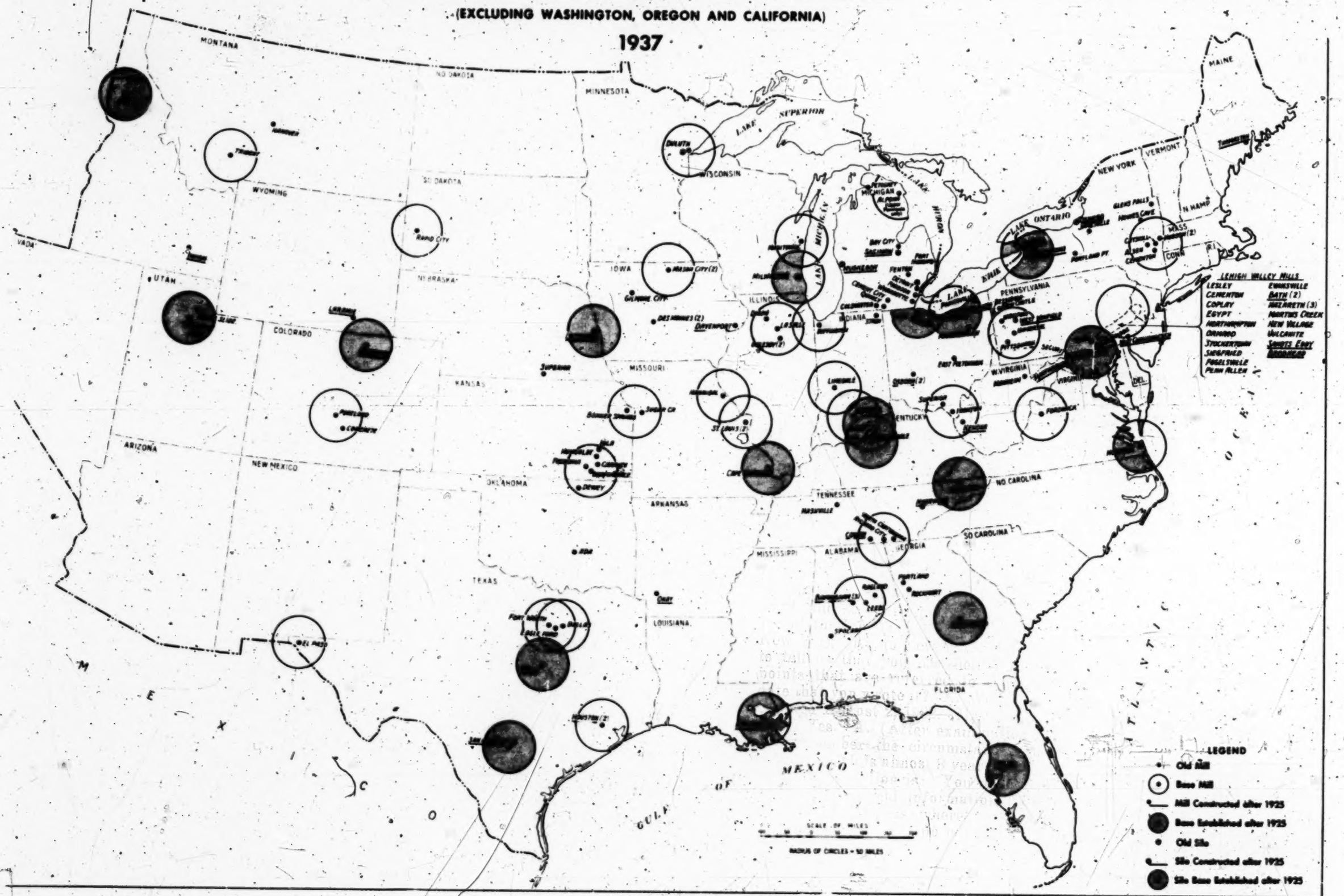
LEHIGH VALLEY MILLS
LESLEY
CEMENTON
COPLEY
WEST COPLEY
EGYPT
NORTHAMPTON
ORMROD
STOCKERTOWN
SIEGFRIED
FOGELSVILLE
EMMAUS
BATH (2)
NAZARETH (3)
MARTINS CREEK
NEW VILLAGE
VALCONTE
PENN ALLEN

LEGEND
- Old Mill
- Base Mill
- Mill Constructed after 1920
- Base Established after 1920
- Old Silo
- Silo Constructed after 1920

PORTLAND CEMENT PLANTS IN THE UNITED STATES

(EXCLUDING WASHINGTON, OREGON AND CALIFORNIA)

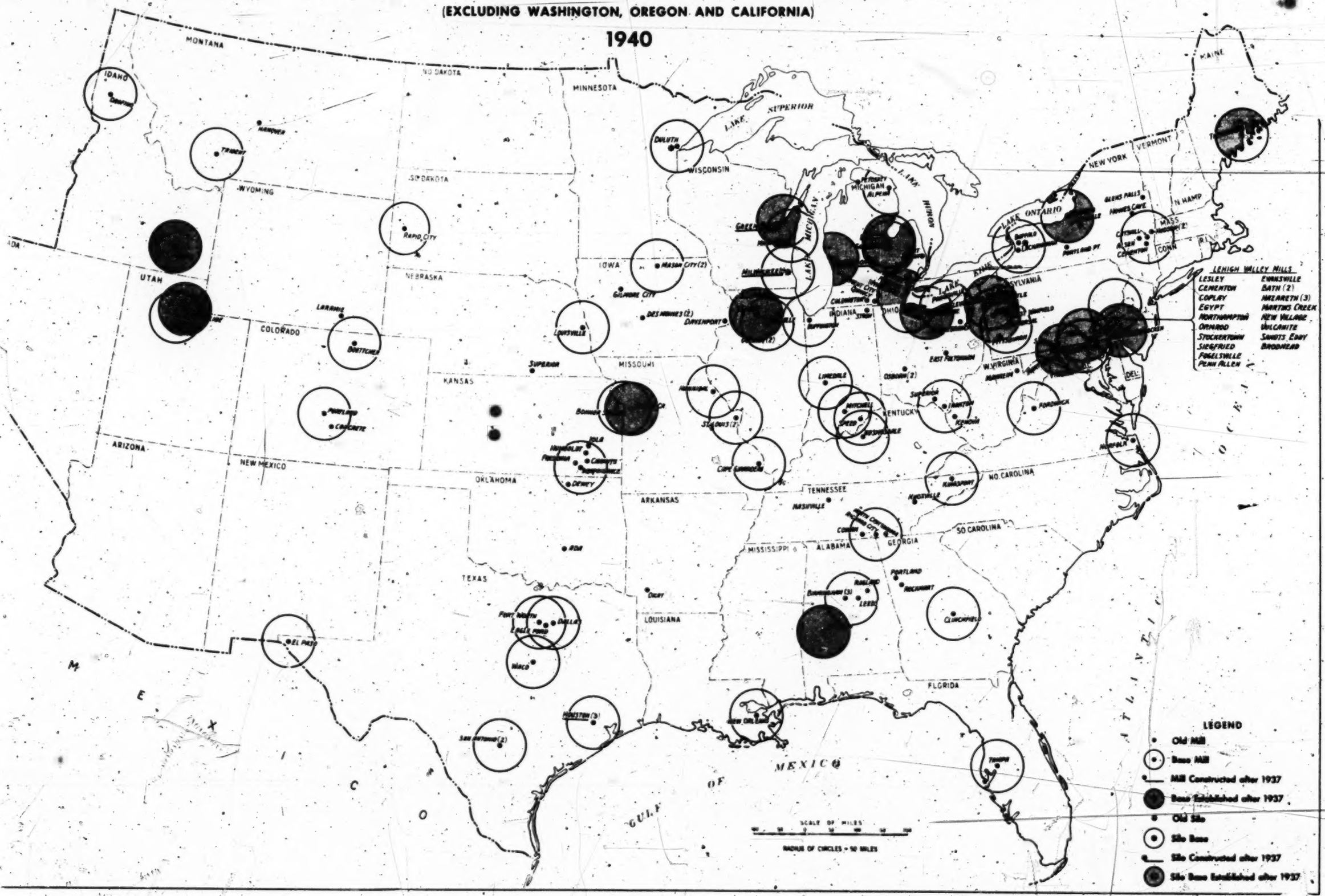
1937



PORTLAND CEMENT PLANTS IN THE UNITED STATES

(EXCLUDING WASHINGTON, OREGON AND CALIFORNIA)

1940



CITATIONS TO THE RECORD FOR DATA SHOWN ON MAPS NOS. II B-G

ALABAMA

Company[1]	Mill[2]	In	Out	Base	Non-Base
Atlantic & Gulf P.C. Co.	Ragland	Resp. Ex. 3764 A	——	47.3 miles from Birmingham	Com. Ex. 976-9 V
Standard P.C. Co.	Leeds (Birmingham)	Tr. 38609-10	——	Tr. 33101 Resp. Ex. 2375 B	
Alabama P.C. Co.	Spocari	Resp. Ex. 3764 A	——	Resp. Exs. 457, 1109	
Phoenix P.C. Co.	No. Birmingham	Resp. Ex. 3765 B	——		
Lehigh	Tarrant City (Birmingham)	Id.	——	Tr. 26680-81	
Phoenixville P. C. Corp.	Phoenixville (Birmingham)	Resp. Ex. 3765 C	——	Tr. 25445	

[1] The company name in each instance is the name of company which operated the mill at the time it first appears on the maps. Many of these companies are no longer in existence. The mills operated by respondents during the period covered by the complaint are shown in the Foreword, *supra*, pp. 6-16.

[2] An * indicates a silo or packing plant.

Company	Mill	In	Out	Base	Non-Base
		ARIZONA			
Arizona Cement Co.	Phoenix	Resp. Ex. 3764 A	Resp. Ex. 2531		
		ARKANSAS			
Arkansas	Okay	Resp. Ex. 3765 C	—		
		COLORADO			
Colorado	Portland	Tr. 13837	—	Com. Ex. 967-11 O	
United States P.C. Co.	Concrete	Com. Ex. 3176 OO	—		
Colorado	Boettcher	Resp. Ex. 3765 C	—	Com. Ex. 967-14 E	
		FLORIDA			
Florida	Tampa	Resp. Ex. 3765 C	—	Com. Ex. 975-13 L	
		GEORGIA			
Southern States	Rockmart	Tr. 37474	—		
Piedmont P.C. Co.	Portland	Resp. Ex. 3765 A	—		
Clinchfield P.C. Co.	Clinchfield	Resp. Ex. 3765 B	—	Resp. Ex. 455 Com. Ex. 975-10 C	

Company	Mill	In	Out	Base	Non-Base
IDAHO					
Idaho	Inkom	Resp. Ex. 3765 C		Resp. Ex. 1109 D	
Washington-Idaho Lime Products Co.	Orofino	Id.		Com. Ex. 1213 B	
ILLINOIS					
Illinois Steel	So. Chicago	Tr. 13033-34	Resp. Ex. 3521		
Marquette	Oglesby	Tr. 13962	—		
Sandusky	Dixon	Tr. 40022	—	(Tr. 40055-56 (Tr. 40026 (43.5 miles from (La Salle	Com. Ex. 975-17 A Tr. 40054
German-American P.C. Co.	La Salle	Resp. Ex. 3764 A	—	Resp. Ex. 2610	
Chicago P.C. Co.	Oglesby	Id.	—	Tr. 26679-80	
INDIANA					
Wabash	Stroh	Tr. 47649 Com. Ex. 3148 B	—	—	
Universal P.C. Co.	Buffington	Resp. Ex. 3764 B	—	Tr. 34795-96	

INDIANA (Continued)

Company	Mill	In	Out	Base	Non-Base
Louisville Cement Co.	Speed	Com. Ex. 3130 B	—	Com. Ex. 975-18 L, 18 Y, 19 A Tr. 13310	
Sandusky P.C. Co.	Syracuse	Resp. Ex. 3764 B Tr. 40038 (Stricken)	Tr. 40038 (Stricken)		
United States P.C. Co.	Bedford	Resp. Ex. 3764 B	Resp. Ex. 3521		
Lehigh	Mitchell	(Id. (Tr. 36563-65		Com. Ex. 3235-Z 55-56 Tr. 36673-74	
Indiana P.C. Co.	Limedale (Greencastle)	Resp. Ex. 3765 B	—	Resp. Ex. 455 Com. Ex. 975-7 S	

IOWA

Northwestern States P.C. Co.	Mason City	1908 Tr. 36449	—		
Iowa P.C. Co.	Des Moines	1907 Tr. 41601 (Stricken)	—		

KANSAS (Continued)

Company	Mill	In	Out	Base	Non-Base
Western States P.C. Co.	Independence	Resp. Ex. 3764 B	—	Tr. 34716	
Fredonia P.C. Co.	Fredonia	Id.	—	Id.	
Monarch	Humboldt	Tr. 42183	—	Id.	
Altoona P.C. Co.	Altoona	Resp. Ex. 3764 B	Id.		
Bonner Brand P.C. Co.	Bonner Springs	Id.	—	Resp. Ex. 455	
Great Western P.C. Co.	Mildred	Id.	Resp. Ex. 2521		
Chanute Cement Co.	Chanute	Resp. Ex. 3765 A	Tr. 46836-37 Resp. Ex. 2521		
Lumberman's P.C. Co.	Carlyle	Id.	Id.		

KENTUCKY

Kosmos	Kosmosdale	Tr. 12400 Resp. Ex. 3764 B	—	Tr. 12400-01 Com. Ex. 975-13 I	

MICHIGAN (Continued)

Company	Mill	In	Out	Base	Non-Base
Wolverine	Quincy	Tr. 35893	—		
Wolverine	Coldwater	Id.	—		
Peerless	Union City	Com. Ex. 3235 R	Resp. Ex. 2405 B		
Huron	Alpena	Resp. Ex. 47	—	Resp. Ex. 2610 Tr. 30040	Com. Ex. 1213 Tr. 33410-11
Elk Cement & Lime Co.	Elk Rapids	Resp. Ex. 3764 B	Resp. Ex. 2521		
Hecla P.C. Co.	Bay City	Id.	Id.		
New Aetna P.C. Co.	Fenton	Resp. Ex. 3764 C	—	Resp. Ex. 2405 C	
Burt P.C. Co.	Bellevue	Resp. Ex. 3764 B	Resp. Ex. 2405 C	Resp. Exs. 455, 2610	Resp. Ex. 2405 C
Peninsula P.C. Co.	Cement City	Id.	—		
Wyandotte P.C. Co.	Wyandotte	Id.	—	(Resp. Ex. 2610 D (Tr. 30040	Tr. 33410-11
Michigan P.C. Co.	Chelsea	Resp. Ex. 3765 A	Resp. Ex. 2405 C		

Company	Mill	In	Out	Base	Non-Base
IOWA (Continued)					
Lehigh	Mason City	Resp. Ex. 3765 A	—	Tr. 26678	
Fort Dodge P.C. Co.	Gilmore City	Resp. Ex. 3765 B	—		
Dewey	Davenport	1927	—		
Pyramid P.C. Co.	Valley Jct.	Tr. 14274 Resp. Ex. 3765 B			
KANSAS					
Ash Grove	Chanute	Com. Ex. 3122 A-B	—	Tr. 34716	
United States P.C. Co.	Yocemento	Resp. Ex. 3764 B	Tr. 46826-28 Resp. Ex. 2521		
United Kansas P.C. Co.	Lehunt	Id.	Id.		
United Kansas P.C. Co.	Iola	Id.	Tr. 46826-28 Resp. Ex. 2610 A		
United Kansas P.C. Co.	Neodeska	Id.	Resp. Ex. 2521		
Iola P.C. Co.	Iola	Id.	—	Tr. 26678-79 Tr. 32632	

Company	Mill	In	Out	Base	Non-Base
LOUISIANA					
Louisiana P.C. Co.	New Orleans	Resp. Ex. 3765 C	—	Com. Ex. 975-6 G	
MAINE					
Lawrence	Thomaston	Resp. Ex. 3765 C	—	Tr. 8207, 8219-20	
MARYLAND					
Security Cement & Lime Co.	Security	Resp. Ex. 3764 B	—	(Tr. 33795-96, 33808 (39 miles from Union Bridge	Com. Ex. 969-4 I
Tidewater P.C. Co.	Union Bridge	Resp. Ex. 3765 A	—	Resp. Exs. 455, 2610 C Tr. 26677-78	Tr. 26677
MICHIGAN					
Newaygo	Newaygo	Tr. 40026 (Stricken)	Resp. Ex. 2405 B	Resp. Ex. 2610	Resp. Ex. 2405 B
New Egyptian P.C. Co.	Fenton	—	Resp. Ex. 2405 B		
Omega P.C. Co.	Mosherville	Com. Ex. 2235 C	Resp. Ex. 2531		

Company	Mill	In	Out	Base	Non-Base
MISSOURI					
St. Louis P.C. Co.	Prospect Hill	Tr. 37123-24	——	Tr. 37309	
Kansas City P.C. Co.	Cement City (Sugar Creek)	Resp. Ex. 3764 C	——	Resp. Ex. 455 Tr. 37368-69 Resp. Ex. 1109	Tr. 37309-10
Atlas P.C. Co.	Hannibal	Id.	——	Resp. Ex. 3745 B Com. Ex. 2878 K-L	
Continental P.C. Co.	Continental (St. Louis)	Id.	——	Resp. Ex. 2375 B	
Cape Girardeau P.C. Co.	Cape Girardeau	Resp. Ex. 3765 A	——	Resp. Ex. 2610 B Tr. 24588	Resp. Ex. 2610 D
MONTANA					
Three Forks Id.	Trident	Resp. Ex. 3764 C	——	Resp. Ex. 2610 A	
	Hanover	Resp. Ex. 3765 B	——	Resp. Ex. 2610 A	Com. Ex. 1213 B
NEBRASKA					
Nebraska	Superior	Resp. Ex. 3765 A	——	Com. Ex. 976-4 X	Com. Ex. 976-4 X
Ash Grove	Louisville	Resp. Ex. 3765 C	——	Com. Ex. 1213 A Tr. 13593	

NEW YORK (Continued)

Company	Mill	In	Out	Base	Non-Base
Alsen's American P.C. Works	Alsen	Id.	—	Tr. 23116-17 Resp. Ex. 455	
Catskill Cement Co.	Cementon	Tr. 22510-11 Resp. Ex. 3764 C	—		
Cayuga Lake Cement Co.	Portland Point	Id.	—		
Marengo P.C. Co.	Caledonia	Id.	Resp. Ex. 3521		
Knickerbocker P.C. Co.	Hudson	Resp. Ex. 3765 A	—	Tr. 32634-36	
Thomas Millen & Co.	Jamesville	Id.	—		
Acme Cement Corp.	Catskill	Id.	—	In effect a base mill Tr. 33815-16, 34078	

OHIO (Continued)

Company	Mill	In	Out	Base	Non-Base
Ironton P.C. Co.	Ironton	(Com. Ex. 3235 Z 34 (Resp. Ex. 3764 C	——	Resp. Ex. 455	
York P.C. Co.	New Boston	Resp. Ex. 3764 C	Resp. Ex. 2521		
Superior	Superior	Com. Ex. 3235 Z 12	——	17.9 miles from Ironton	Com. Ex. 970-5 F
Lehigh	Wellston	Resp. Ex. 3764 C	Resp. Ex. 2521 Tr. 26577-78		
Sandusky Cement Co.	Silica (Toledo)	Resp. Ex. 3765 B	——	Resp. Ex. 455	
Pittsburgh	Fultonham	Id.	——		
Southwestern	Osborn	Id. Tr. 28707	——		
Standard	Cement (Painesville)	Resp. Ex. 3765 B	——		
Wabash	Osborn	Resp. Ex. 3765-C	——		
Huron	Cleveland*	Resp. Ex. 47		Tr. 33413	
Great Lakes	Cleveland*	Tr. 26880-81			
Huron	Toledo*	Resp. Ex. 47		Tr. 33414	

MICHIGAN (Continued)

Company	Mill	In	Out	Base	Non-Base
Petoskey	Petoskey	Resp. Ex. 3765 B	—		
Aetna	Bay City	Id.	—	Tr. 29957, 30044-45 Resp. Ex. 1109	Tr. 33410-11, 33399
New Egyptian P.C. Co.	Port Huron	Id.	—		
Huron	Detroit*	Resp. Ex. 47	—	6 miles from Wyandotte	Com. Ex. 970-6 S
Huron	Muskegon*	Id.		Tr. 33408-09	—
Universal Atlas	Muskegon*	Tr. 35174-76			—
Huron	Saginaw*	Resp. Ex. 47		Tr. 33398, 30040 Resp. Ex. 2010 G	Tr. 33410-11
Ford Motor Co.	Dearborn	Resp. Ex. 3765 B	—		
Peerless	Detroit	Id.	—		

MINNESOTA

Universal P.C. Co.	Duluth	Resp. Ex. 3765 A		Resp. Exs. 455, 2487	
Huron	Duluth*	Resp. Ex. 47			

NEW JERSEY

Company	Mill	In	Out	Base	Non-Base
Alpha	Alpha	Tr. 23012	Resp. Ex. 2521		
Vulcanite	Vulcanite	Com. Ex. 3128 B	—	Com. Ex. 969-7 O	
Edison	New Village	Tr. 35589, 35592	—	Tr. 35629-30	

NEW YORK

Glens Falls	Glens Falls	Com. Ex. 3147 B	—		
Wayland P.C. Co.	Wayland	Com. Ex. 3359	Resp. Ex. 2521		
Empire P.C. Co.	Warners	Id.	Resp. Ex. 3764 C		
Helderberg Cement Co.	Howes Cave	(Com. Ex. 3359 (Resp. Ex. 3764 C	—	Com. Ex. 968-14 I	
New York and New England Lime & Cement Co.	Hudson	Resp. Ex. 3764 C	—	Resp. Ex. 455	

NEW YORK (Continued)

Company	Mill	In	Out	Base	Non-Base
Federal	Buffalo	Resp. Ex. 3765 C	—		
Great Lakes	Buffalo	Id.	—	Tr. 26675-76	
Huron	Buffalo*	Resp. Ex. 47			
Huron	Oswego*	Id.		Tr. 33437	

OHIO

Sandusky Cement Co.	Bay Bridge	Tr. 40025-26	—	Tr. 40055-56 46 miles from Toledo	Com. Ex. 970-13 P
Castalia	Castalia	Com. Ex. 3121 A	Tr. 47673-74		
Diamond	Middle Branch	Com. Ex. 3139 C	—		
Buckeye	Harpers	—	Resp. Ex. 2521 Resp. Ex. 3764 C		
Alma	Wellston	Com. Ex. 3235 W	Resp. Ex. 2521		

OKLAHOMA

Company	Mill	In	Out	Base	Non-Base
Oklahoma	Ada	Resp. Ex. 3764 C	—	Resp. Ex. 2375 B Tr. 33101	Resp. Ex. 2506 B
Dewey	Dewey	1907 Tr. 14274			
Choctaw P.C. Co.	Hartshorne	Resp. Ex. 3765 A	1921 Resp. Ex. 2521		

PENNSYLVANIA

Whitehall	Cementon	Tr. 28473-74	—	Tr. 26675, 38059	
Atlas	Northampton	Tr. 25996-97	—	Resp. Ex. 455	
Crescent P.C. Co.	Wampum	Com. Ex. 3118 D	—	(Tr. 40055-56 (49.6 miles from (Universal	Com. Ex. 970-14 G
Nazareth	Nazareth	Tr. 27956-57	—	Tr. 26675, 38059	
Phoenix	Nazareth	Tr. 25996	—	Id.	
Bonneville	Siegfried	Com. Ex. 3859	Resp. Ex. 3764 D Tr. 25996-97	Id.	
Lawrence	Siegfried	Tr. 8207	—	Id.	

PENNSYLVANIA (Continued)

Company	Mill	In	Out	Base	Non-Base
Coplay	Coplay	Tr. 48098-99	—	Id.	
Lehigh	Ormrod	Tr. 26562-63	—	Id.	
Northampton P.C. Co.	Stockertown	Com. Ex. 3359 Tr. 25975-76	Resp. Ex. 3764 D		
Lehigh	West Coplay	Resp. Ex. 3764 D	Resp. Ex. 3521 Tr. 26575		
Alpha	Martins Creek	Id.	—	Id.	
Reliance Cement Co.	Lesley	Id.	—	Id.	
Lehigh	Foglesville	Id.	—	Id.	
Allentown	Evansville	Id.	—	Id.	
Dexter P.C. Co.	Nazareth	Id.	—	Id.	
Central Cement Co.	Egypt	Id.	—	Id.	
Penn-Allen Cement Co.	Penn-Allen	Id.	—	Id.	

Company	Mill	In	Out	Base	Non-Base
PENNSYLVANIA (Continued)					
West Penn	West Winfield	Id.	—	40 miles from Universal	Com. Ex. 970-3 Y
Keystone	Bath	Id.	—	Tr. 26675, 38059	
National Portland Cement Co.	Brodhead	Id.	—	Id.	
SOUTH DAKOTA					
Western P.C. Co.	Yankton	Com. Ex. 3235 T	Resp. Ex. 3521		
State Plant	Rapid City	Resp. Ex. 3765 B	—	Com. Ex. 975-2 H	
TENNESSEE					
Dixie P.C. Co.	Richard City	Resp. Ex. 3764 D	—	Tr. 32632, 32654	
Clinchfield P.C. Co.	Kingsport	Resp. Ex. 3765 A	—	Resp. Ex. 455 Tr. 38292	Com. Ex. 975-8 J
Signal Mt.	No. Chattanooga	Resp. Ex. 3765 B	—	31 miles from Richard City	Com. Ex. 975-12 X

TEXAS (Continued)

Company	Mill	In	Out	Base	Non-Base
Trinity P.C. Co.	Forth Worth	Resp. Ex. 3765 B	—	Com. Ex. 967-17 X	
Atlas P.C. Co.	Waco	Resp. Ex. 3765 C	—	Tr. 25484; Resp. Ex. 2487	
Republic P.C. Co.	Longhorn	Id.	—	Com. Ex. 976-3 C, 3 F	
Trinity P.C. Co.	Houston	Id.	—	Com. Ex. 967-17 D	
Gulf P.C. Co.	Houston	Resp. Ex. 2520	—	—	

UTAH

Ogden P.C. Co.	Bakers Spur	Resp. Ex. 3764 D	Tr. 47646		
Union P.C. Co.	Devil's Slide	Id.		Resp. Ex. 1109 C	
Utah P.C. Co.	Salt Lake City	Id.		Com. Ex. 874-3 H	

VIRGINIA

Virginia P.C. Co.	Fordwick	Tr. 31362-63	—	Tr. 26676-77	
Norfolk P.C. Co.	Berkley (Norfolk)	Resp. Ex. 3764 E	—	Com. Ex. 968-15 M	

These should be compared with maps #II-C, II-D at pp. 360 and 364, *supra*, showing the number of bases in 1910 and 1915.

4. Reasons for Establishing Base or Non Base Mills

a. Base Mills

A number of witnesses testified to the effect that ordinarily where there is a large consuming market near the mill or in the surrounding area the management of that mill establishes a base for the purpose of making that market as unattractive as possible to more distant mills.[1] Lehigh in its Burns & Clark questionnaire stated:[2]

> "* * * As the number of plants in the west was increased, mill base prices were established largely for the competitive purpose of excluding more distant mills from the markets. This was a perfectly natural development."

Lehigh has taken the position that "each cement producing district should be a basing point"[3] and as it acquired new mills has made made them all basing point mills.[4] Lehigh's

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[1] Affleck, President, Universal Atlas (R) Tr. 34797-98.
Browder, Traffic Manager, Penn-Dixie (R) Tr. 38291-93.
Bowen, Vice President, Lehigh (R) Tr. 26673-74, 26678-83.
Coogan, Vice President, Alpha (R) Tr. 23134.
Dawson, Vice President, Medusa (R) Tr. 40568-70, 40582, 40052-53.
Koch, Vice President, Lone Star (R) Tr. 32636.
Tyler, President, Dewey (C) Tr. 14277-81.
Com. Ex. 913-4 A-B.

[2] Com. Ex. 913-4 A-B.
And see Section 3, evidence re growth of bases, *supra*, pp. 361 *et seq.*

[3] See Lehigh's answers to Burns & Clark Questionnaire:
Com. Exs. 968-2 H, 3 Z, 12 N, 12 R, 12 V, 12 Z, 13 D, 16 G, 16 S; 969-16 O, 970-6 B, 967-16 F, 975-11 Z, 15 M.

[4] Com. Exs. 967-16 G, 968-2 I, 4 A, 12 O, 12 S, 12 W, 13 A, 13 E, 15 J, 16 H, 16 T.

Vice President Bowen testified as to the reasons why Lehigh made its various mills bases and typical is his testimony respecting the Company's Mitchell, Indiana mill:

> "First, when the Mitchell plant was built, it was possible to sell the output of that plant at very excellent advantage, taking advantage of the lower freight rates from that plant, and because destination costs in that vicinity were to be figured on the Lehigh Valley freight rates, and, for a long time after we built that mill we, and other manufacturers, continued to ship considerable cement from the Lehigh Valley into that territory; but as time went on and new plants were built, we changed status of that plant and made it a basing-point mill in order that we might be able to exclude from that territory the Lehigh Valley mills which until that time had continued to ship largely into that territory."[5]

All but two of Alpha's operating mills are base mills. "Generally speaking" the mills acquired by Alpha have been "made a basing point immediately."[6] Coogan, Alpha Vice President, explained the reason for the status of each of his company's mills.[7] For example regarding Alpha's Alsen mill he testified:

> "Well, we felt that that mill was located freightwise to a very important consuming territory. That

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[5] (R) Tr. 26673-74.

As to Lehigh's other mills see Bowen, Vice President, Lehigh (R): Buffalo, Tr. 26675-76; Fordwick, Tr. 26676-77; Union Bridge, Tr. 26677; Mason City, Tr. 26678; Iola, Tr. 26678; Oglesby, Tr. 26679; Birmingham, Tr. 26680-81; Metaline Falls, Tr. 26682-83.

[6] See Alpha Burns & Clark Questionnaire Answers:

Com. Exs. 968-8 Y-Z, 9-Y-Z, 969-2 V-W, 970-10 G-H, 16 I-J, 975-20 H-I, 976-9 Q-R.

[7] (R) Tr. 23111, 23113-16.

PENNSYLVANIA (Continued)

Company	Mill	In	Out	Base	Non-Base
Bath P.C. Co.	Bath	Id.	Resp. Ex. 2521 Tr. 26584	Id.	
Pennsylvania	Bath	Id.	—	Id.	
Lehigh	Newcastle	Id.	—	Resp. Ex. 1109 B	
Universal	Universal	Tr. 35875	—	Tr. 34795-96	
Sandusky P.C. Co.	York	Resp. Ex. 3764 D	—	Tr. 40055-56	
New Castle P.C. Co.	Newcastle	—	Com. Ex. 3236 Z-32		
Hercules	Hercules (Stockertown)	Tr. 25973-74 Resp. Ex. 3765 B	—	Tr. 26675, 38059	
Bessemer	Bessemer	Resp. Ex. 3765 B	—		
Lehigh	Sandt's Eddy	Resp. Ex. 3765 C	—	Tr. 26675, 38059	
Valley Forge	West Conshohocken	Id.		Resp. Ex. 457; Tr. 26970-71	
Davidson Coke & Iron Co.	Neville Island	Id.	—		

TENNESSEE (Continued)

Company	Mill	In	Out	Base	Non-Base
Hermitage	Nashville	Id.	—		
Volunteer	Caswell (Knoxville)	Resp. Ex. 3765 C	—		
Cumberland	Cowan	Id.	—	35 miles from Richard City	Tr. 39896

TEXAS

Alamo Roman and P.C. Co.	Cementville (San Antonio)	Com. Ex. 3161 A	—	Com. Ex. 976-3 C, 3 F	
Texas P.C. Co.	Cement (Dallas)	Resp. Ex. 3764 D	—	Tr. 32634 Resp. Ex. 455	
Southwestern States P.C. Co.	Eagle Ford	Id.	—	3.5 miles from Harry's	Com. Ex. 976-13 I
Southwestern P.C. Co.	El Paso	1909 Tr. 28707	—	Tr. 38948-49; Resp. Ex. 3375 B	
Texas P.C. Co.	Houston	Resp. Ex. 3765 A	—	Tr. 32634 Resp. Ex. 455	

WEST VIRGINIA

Company	Mill	In	Out	Base	Non-Base
Alpha	Manheim	Tr. 33510-11 Resp. Ex. 3764 E			
Basic Products Co.	Kenova	Resp. Ex. 3765 C		12 miles from Ironton	Tr. 29406-07
Standard Lime & Stone Co.	Martinsburg	Id.			

WISCONSIN

Manitowoc P.C. Co.	Manitowoc	Resp. Ex. 3765 B	—	Tr. 40052-53 Com. Ex. 975-16 F, 16 Z	
Huron	Green Bay*	Tr. 33442			
Universal Atlas	Green Bay*	Tr. 35165-66		Tr. 35166	
Huron	Milwaukee*	Tr. 33442		Tr. 33443-44	
Universal Atlas	Milwaukee*	Tr. 35158-59		Tr. 35159; Resp. Ex. 2513	

WYOMING

Monolith-Portland Midwest Co.	Laramie	Resp. Ex. 3765 C			

it provides the advantage of water transportation and it was also in a section where there were several other mills and we felt that with a mill freight-wise located favorably to a large consumer territory and located in a territory where there was a fairly large production, that there should be a base figure used at our mill for making destination prices."[8]

As to Bellevue, Michigan (since dismantled)[9] Coogan testified:

"Well, there was a fair consuming or consumption territory around there and we wanted to make—we wanted to be in position to make our prices at some of those points, or our general rate structure, so that the nearby points would be—our destination points would be based on our mill. In other words, so that as to the nearby points, our destination prices would be based on our mill at Bellevue. There was Battle Creek and Kalamazoo and some other fairly good consuming territory, but that mill, so far as we were concerned, was never a very serious factor, and I might say never very much of a success."[10]

Prices at Ironton, Ohio, had been based on Universal, Pa., Mitchell, Ind., and Buffington, Ill.; until 1915 when Alpha acquired the Ironton plant. Alpha made Ironton a base because "there had been a considerable market developed in the southern part of Ohio."[11]

Medusa, all of whose mills were "generally" non-base mills until July 1939, and base mills thereafter[12] stated that it was a matter of "individual company policy"

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[8] (R) Tr. 23116.

[9] Magee, Vice President, Alpha (R) Tr. 22633.

[10] Coogan, Vice President, Alpha (R) Tr. 23124.

[11] Id., Tr. 23134.

[12] Com. Ex. 970-11 X: Burns & Clark Questionnaire Answer. Dawson, Vice President, Medusa (R) Tr. 40055, 40588.

whether a mill was made a base or not.[13] Medusa's Vice President Dawson testified that the object of the company in establishing bases at its mills was "to get a geographical advantage that they had not theretofore enjoyed".[14]

Universal Atlas operates all of its mills as base mills.[15] B. F. Affleck former President of the Company, testified as to the considerations which have motivated the company's actions.[16] As to Universal, Pa., he said making it a base

> "made it less attractive for the Lehigh mills and gave us a better chance to build up our business." (Tr. 34797-98)

As to the considerations that led to making Buffington, Ind. a base in 1915 he said they were

> "pretty much the same. Prior to that time we had based prices largely on La Salle's three mills but with increased output at Buffington, we couldn't hold our market * * * we had to make Buffington a base. It was an artificial, unnatural, illogical practice not to have Buffington a base point". (Tr. 34798)

R. W. Moore, Vice President of Dewey testified that Dewey established a base at its Dewey, Oklahoma mill in 1931 because

> "Some of our competitors were shipping into our nearby territory pretty heavily, and we conceived the idea that if we reduced our prices in that territory, that we might get some of the business, but we were fooled, we did not."[17]

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[13] See Medusa Burns & Clark Questionnaire Answers:
Com. Exs. 970-8 R, 8 P, 11 X, 11 Z, 12 T, 13 Y, 14 A, 14 P, 14 R, 15 D, 15 F, 975-16 W, 17 L, 17 J.

[14] (R) Tr. 40569-70, 40582.

[15] Affleck, President, Universal Atlas (C) Tr. 13035; (R) Tr. 34795-96.

[16] Id., Tr. 34795-98;
Resp. Ex. 2487: Changes in price bases.

[17] (R) Tr. 47169, 47174.

Lawrence put in a base at its Thomaston, Me. mill in 1938 under circumstances described by James Ackerman, Sales Manager as follows:[18]

"There was a large operation contemplated at a point called Mattawankaeg, which involved 105,000 barrels of cement, which is a very sizeable order. We solicited that job actively for several months. I think the job first came out some time in November of last year. During the course of our solicitation, I followed the job personally myself a good many times and went to Boston about it. During the course of our negotiations with the buyer, we learned that foreign cement was very much a competitor, in fact, to my certain knowledge there were five carloads of imported cement purchased by this buyer. We did not want to lose that order, and more than that, we did not want foreign cement to get established in Maine. We realized that if we were going to compete, or, rather, we realized that if we were going to be in a position to compete, we would have to do something, to meet the price at which foreign cement was being offered. The Main Central Railroad established a special rate from Rockland to Mattawankaeg and we put in our price base, and the result was a lower price at destination, enabling us to compete with foreign.

Q. And you got the business? A. In the final windup, we got the business.

• • •

Q. Was this price which you made at the Dam a special price for that particular project? A. No, sir.

Q. From what you have said, it became a general price? A. Anybody at Mattawankaeg can get our cement at the same figure as anybody else provided they were buyers of the same class.

Q. Prior to that time, Mr. Ackerman, before this Dam incident came up, had you ever considered putting in a base in Maine? A. Yes, sir; we are

[18] (C) Tr. 8219-21.

constantly considering, or we were constantly considering putting in a base. I think I testified that we were losing money at that plant and had been for eight of the ten years we operated, and we were giving consideration to anything and everything that we could do to make it a profitable operation. Among those considerations was the establishment of a base."

Penn-Dixie established a base at its Kingsport, Tenn. mill in October 1935 "to keep our competitors out, as far as possible."[19]

Koch, Vice President of Lone Star asked the reason why Lone Star had established bases at its various mills, testified:

"Well, our first principal reason, of course, was to be selfish, to exclude, so far as we could, competition from the area which we could serve to advantage, rate-wise speaking. At the same time we did that, it naturally lowered the price to the buyer, the user of cement, in the area so affected.

Q. You have mentioned that by putting in basing points you had an effect on competition around the area of your mill. Will you explain just what that effect was?" (Tr. 32636)

* * *

"A. Well, might I make this statement? It naturally would depend upon the base that we put in; it is very obvious that you cannot pay freight from a distance and equal the nearest point without a great absorption.

Q. Did you find that after putting in basing points that you had more or less competitors trying to sell cement in the area around your plant where you might have had the benefit of the better freight rates than any of your competitors? A. Well, at first—it follows that those that had been serving the market, or enjoying part of it, would try to remain. It takes a period of time, but our experience was that

[19] Browder, Traffic Manager, Penn-Dixie (R) Tr. 38292.

naturally the competition at those points dwindled down.

Q. Did it dwindle, Mr. Koch, in the sense that there were fewer people selling in that area? A. Oh, yes, very materially, and those that were selling were not nearly as active.

Q. Now, when you put in the base at your mill at Bonner Springs, was there any reduction in price in some of the marketing areas adjacent to that mill? A. Yes, that probably reduced the Kansas City market, and some nearby markets, all the way from one to fifteen cents a barrel.

Q. You mentioned the Kansas City market. Would the reduction have covered a fairly large area, or just one or two points? A. Well, mile-wise, I wouldn't consider it a large area. Tonnage-wise, yes.

Q. Well, was the effect of putting in the base to reduce the delivered price at several points, or only a few points? A. Well, in that case it reduced it at quite a number of points.

Q. Now, do you happen to recall that in connection with the base put in at the Limedale plant, any particular point, for instance, Terre Haute, Indianapolis, or any of these points? A. Oh, yes, it affected, I would say, a territory in Terre Haute, Indianapolis—that would be 40 miles one way and 45 the other, and perhaps forty or fifty miles to the north,—it was affected by being lowered from one to fifteen cents a barrel." (Tr. 32637-38)

* * *

"Prior to the time, Mr. Koch, that you put in a base at the New Orleans mill, how many competitors were making business in that Louisiana area? A. Well, ten to a dozen.

Q. And after you put in the base, how many competitors were seeking business in that area? A. I don't believe there were over two or three.

Q. Now, what caused the decrease in the number of producers seeking business in that area? A. Well, of course, I can only guess what is in the other man's mind; if you want an opinion I could say it was because it was thin business.

Q. Well, relying on your experience, Mr. Koch? A. Not as good as a service you could render being right there in that part of the town.

Q. And did the price have anything to do with it? A. Oh, yes, entirely—well, I say entirely; service helps some, but price and service.

Q. Now, would you say that the decline in the number of competitors seeking business in the area of the New Orleans plant is more or less typical with respect to other plants where you put in bases? A. Well, Mr. Brick, they come up just as close as they can. When you say 'area', of course, there gets to be common ground outside, where they are still quite active, but I was thinking primarily of New Orleans itself, and what relates to that is quite well illustrated in our Norfolk instance, which later is carried on up into your noble capital here.

Q. When you found, Mr. Koch, that there was a decline in the number of competitors seeking business in such territory, did you find that there was any difference with respect to the activity of the competitors who remained in the territory? A. Oh, yes.

Q. That is, with competitors of your company? A. Oh, yes, they are not nearly as active." (Tr. 32640-41)

On cross examination Koch testified:

"Q. You say that when you established new bases at your mills you reduced the number of competitors materially for a period time. Was it a temporary reducton in the number of competitors? A. Now, that is not what I said."

* * *

"Trial Examiner Norwood: Did you say that?

The Witness: That is not as I recall it. I said we reduced the number of competitors as time went on—I may have said over a period of time. By that I meant that they did not all desert the markets at once. It takes time to finally evolve these things to find out whether they are going to remain or whether they are going to withdraw.

By Mr. Wooden:

Q. Well, what I am trying to get at is whether a situation of a reduction in the number of competitors was a permanent situation, or whether, later on, the number of competitors increased again in the territory on your base mills? A. There might be some slight fluctuations, but, generally speaking, it is permanent.

Q. You mentioned New Orleans, I believe, that you cut out all but two or three competitors there when you submitted the base. A. It has taken up to the present time to get them to that. That is correct." (Tr. 33213-14)

For the last few years Koch said Lone Star had not had more than "two or three" competitors in New Orleans and Norfolk although in the latter "sometimes a fellow happens to bounce in there, but he is not permanent by any means."[20]

b. Non Base Mills

The Burns and Clark Questionnaire among other things inquired of the management of non base mills whether there was "any obstacle in the way of your converting your mill into a basing point mill" and to explain any such obstacle. Of those surveyed thirty-one non base mills, operated by twenty-three companies, reported that there was no obstacle[1] and four of these mills stated that they had

[20] (R) Tr. 33214-15.

[1] Alpha (Jamesville): Com. Ex. 968-10 R.
(Manheim): Com. Ex. 969-1 K.
Allentown (Evansville): Com. Ex. 969-11 W.
Castalia (Castalia): Com. Ex. 970-4 S.
Cumberland (Cowan): Com. Ex. 976-13 U.
Consolidated (Cement City): Com. Ex. 970-8 B.
Dewey (Davenport, Ia.): Com. Ex. 976-3 P.
(Dewey, Okla.): Com. Ex. 976-11 L.

been or were at the time base mills.[2]

Seven companies reported that there was an "obstacle" to their mills becoming bases and explained as follows:

> *Superior*: "No local market. Located on unimportant railroad—not a central shipping point. A base is now located (Ironton, O.) 15 miles away." (Com. Ex. 970-5 o)
>
> *West Penn*: "If we made our mill a basing point, using the same base price as in effect at the nearest basing point, we would reduce our net yield on deliveries to a number of destinations, which would further increase our already large loss.

Diamond (Middle Branch): Com. Ex. 970-5 D.
Georgia (Portland, Ga.): Com. Ex. 975-1 K.
Glens Falls (Glens Falls): Com. Ex. 969-14 E.
Hawkeye (Des Moines): Com. Ex. 976-13 F.
Hermitage (Nashville): Com. Ex. 976-11 A.
Lawrence (Thomaston): Com. Ex. 969-7 M.
Lehigh (New Castle): Com. Ex. 970-5 Z.
National (Ragland): Com. Ex. 976-10 E.
Nebraska (Superior, Neb.): Com. Ex. 976-4 S.
North American (Security): Com. Ex. 969-4 R.
(Howes Cave): Com. Ex. 969-5 U.

Peerless (Detroit): Com. Ex. 970-7 B.
(Port Huron): Com. Ex. 970-6 N.

Penn-Dixie (Clinchfield): Com. Ex. 975-9 W.
(Kingsport): Com. Ex. 975-7 Y.
(Portland Point): Com. Ex. 968-7 Z.
(Richard City): Com. Ex. 975-9 G.
(Valley Junction): Com. Ex. 976-4 D.

Signal Mountain (Signal Mt.): Com. Ex. 975-13 G.
Southern States (Rockmart): Com. Ex. 976-15 M.
Trinity (Eagle Ford): Com. Ex. 976-13 R.
Valley Forge (West Conshohocken): Com. Ex. 969-13 K.
Volunteer (Knoxville): Com. Ex. 976-10 P.

[2] Alpha (Bellevue): Com. Ex. 970-9 G.
Federal (Buffalo): Com. Ex. 970-11 L.
Kosmos (Kosmosdale): Com. Ex. 970-2 B.
Louisville (Speed): Com. Ex. 975-19 K.

"We are a small mill in a town with no market attracting shipments from other mills, but situated reasonably close to a very large mill already having a base established. If our mill were made a basing point, it would only complicate the figuring of a mutiplicity of freight rates to meet competition at most points, and at a few points would result in loss in mill net to us." (Com. Ex. 970-4 H)

Southwestern (Osborn, O.): "Volume of business in adjacent territory too restricted". (Com. Ex. 970-3 C)

Petoskey: "We never felt we cared to accept less for cement in the territory close to our point than was available as a result of prices predicated on bases close to us." (Com. Ex. 970-7 P).

Pittsburgh: "If everybody did it, our marketing area would be limited unless we continued to absorb freight and if we did not and other mills did not, then it would establish a monopoly around each mill." (Com. Ex. 969-1 Y)

Lone Star and the non-respondent United States Portland Cement Company said the obstacle, in the case of Spocari and Concrete respectively, was that the mills were closed (Com. Exs. 975-5 G, 967-13 D).

At two points in the Burns Clark Questionnaire, mills having a non base status were asked the reason why the mill was not a basing point.[3] The reasons given fall into several distinct categories. Four mills said they were not near a large market.[4] Five attributed the absence of a

[3] See Questions 15 D(2), 23 B IV.

[4] Alpha (Manheim): Com. Ex. 969-1 K.
Peerless (Port Huron): Com. Ex. 976-6 N.
Southwestern (Osborn): Com. Ex. 970-3 C.
West Penn: Com. Ex. 970-4 H.

base to their small size.[5] Eleven mills said they had no base because they were close to one or more other base mills,[6] and four others said their freight rates were substantially the same as those from the nearby base.[7] Four mills cited losses or low returns as the reason they had no base.[8] Penn Dixie (for five mills), Petoskey and Volunteer said it would not be desirable or advantageous to the company to have a base[9] and Southern States stated merely that it did not want a base.[10] Three mills said it was a

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[5] Alpha (Jamesville): Com. Ex. 968-10 R.
Glens Falls: Com. Ex. 969-14 E.
Lehigh (New Castle): Com. Ex. 970-5 Z.
Nebraska: Com. Ex. 976-4 S.
West Penn: Com. Ex. 970-4 H and see footnote 4.

[6] Cumberland: Com. Ex. 976-12 U (base at Richard City).
Dewey: Com. Ex. 976-3 P (bases on both sides).
Georgia: Com. Ex. 975-1 K.
Hermitage: Com. Ex. 976-11 A (bases all around).
Lehigh (New Castle): Com. Ex. 970-5 Z.
Louisville: Com. Ex. 975-19 K.
National: Com. Ex. 976-10 E (bases at Birmingham and Leeds).
Peerless (Detroit): Com. Ex. 970-7 B (base at Wyandotte, 6 miles away).
(Port Huron): Com. Ex. 970-6 N (midway between bases).
Superior: Com. Ex. 970-5 o (base at Ironton).
West Penn: Com. Ex. 970-4 H.

[7] Allentown (Evansville, Pa.): Com. Ex. 966-11 W.
(West Conshohocken): Com. Ex. 969-12 K.
Dewey (Dewey, Okla.): Com. Ex. 976-11 L.
Trinity (Eagle Ford): Com. Ex. 976-13 R.

[8] Consolidated: Com. Ex. 970-8 B.
North American (2 mills): Com. Ex. 969-4 R, 5 U.
Signal Mountain: Com. Ex. 975-13 G.

[9] Penn-Dixie: Com. Exs. 975-9 W, 7 Y, 968-7 Z, 975-9 G, 976-4 D.
Petoskey: Com. Ex. 970-7 P.
Volunteer: Com. Ex. 976-10 P.

[10] Com. Ex. 976-15 M.

matter of policy after considering costs, and other factors respecting the market.[11] Diamond said it had no base "because our marketing practices have always been ethical".[12] Several of the companies combined two or more of the foregoing reasons.[13]

There was some elaboration in the testimony on the reasons why some mills have not established bases. Typical samples representing the several reasons set forth in the answers to the Burns and Clark survey, are set out below.[14]

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[11] Lawrence: Com. Ex. 968-14 X, 14 U.
Lone Star: Com. Ex. 975-6 D.
Trinity: Com. Ex. 967-17 U.

[12] Com. Ex. 970-5 D.

[13] Alpha: Com. Ex. 969-1 K.
Lawrence: Com. Ex. 968-14 X, 14 U.
Lehigh: Com. Ex. 970-5 Z.
Louisville: Com. Ex. 975-19 K.
Peerless: Com. Ex. 970-6 N.
Superior: Com. Ex. 970-5 o.
Trinity: Com. Ex. 976-13 R.
West Penn: Com. Ex. 970-4 H.

[14] Alpha: Coogan, Vice President (R) Tr. 23124-25.
Bessemer: Warren, F. B., Vice President (R) Tr. 32074-79, 32394-97, 32545-47.
Dewey: Moore, R. W., Vice President (R) Tr. 47169.
Federal: Bates, J. E., Sales Manager (R) Tr. 30591-92.
Glens Falls: Titsworth, President (R) Tr. 47891-93.
Green Bag, W. Va.: Wood, General Manager (R) Tr. 29407.
Lawrence: Ackerman, Sales Manager (C) Tr. 8218-20.
Medusa: Dawson, Vice President (R) Tr. 40053-55.
Missouri: Alexander, President (R) Tr. 37309-11.
Monarch: Brooke, Vice President (R) Tr. 42290.
National: Dannelly, Vice President (R) Tr. 39733-34, 39629-30.
North American: Porter, President (R) Tr. 33815-16, 34079-80.
Harte, Vice President (C) Tr. 7523-25.
Peerless: Russell, Vice President (R) Tr. 34344.
Penn-Dixie: Browder, Traffic Manager (R) Tr. 38142-43, 38294-96.

The Osborn mill of Southwestern is about 100 miles from the nearest base mill. Other bases are from 100 to 150 miles away. G. E. Warren, Vice President of the Company, testified that it was not a base because he didn't believe that "the volume of business available justifies it. There are basing points thick around us" and he did not think it would benefit the Company which is "trying to earn on our property" (Tr. 28787, 28789).

Hoenig, Sales Manager of Nebraska said Superior had been a base at one time but: "it was mere fiction * * * we could not put it low enough to make it worth anything to us, because the plant was located in a sparsely settled agricultural territory, with little access to the larger points of tonnage, no access to Kansas City, for example, no access to any of the larger points, excepting Omaha, Nebr., Lincoln,—not even into Des Moines, generally speaking, towns the largest of which, outside of Omaha and Lincoln, were not more than 10,000 and probably not more than four or five thousand people * * *" (Tr. 42011-12).

Bessemer's Vice President, F. B. Warren, testified that its mill was "quite a little ways from two major consuming areas" and there was "not much consumption" near Bessemer's mill (Tr. 32394). He stated that there were very few points where Bessemer has a freight advantage over the two competing mills nearby and that there is not much consumption at those points (Tr. 32396). And continued:

> "If we were to put a base there, that would reflect my idea of what it should be to bring the prices that we would want. That would be one that would have to raise prices generally throughout the area that we sell. And it is so apparent that the dominant factors in those big markets near us want low prices,

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Southwestern (Osborn): Warren, G. E., Vice President (R) Tr. 28787, 28790-91.

West Penn: McKee, Vice President (R) Tr. 27708, 27712-13, 27942-46.

Wolverine: Nelson, J. L., Vice President (R) Tr. 35906, 35908.

that I do not feel that we * * * could make our higher prices prevail in that area. There are mills between us and these bigger markets, mills that are closer to these markets." (Tr. 32397)

Titsworth, President of Glens Falls, testified that the "small size of the territory" in which the Company has a freight advantage and the "small volume of cement that it consumes" made that area "relatively immaterial" to the Company, and that this "very naturally" was considered by him in determining to make the mill a non base mill (Tr. 47891-93).

Harte, Vice President of North American testified as a Commission witness respecting the absence of a base at Security, Md., as follows:

"Q. You have some markets in which you are able to include an amount in your delivered price which is greater than the actual freight from your mill to the destination? A. Yes, we have.

Q. Can you name several such markets? A. Yes, I think I could name them, and likewise give you the difference in dollars and cents.

Q. All right; do that. A. You take our Security Plant. That is not a big industrial center locally. There is no great consumption locally, in Hagerstown proper. I had these figures checked over some time ago, and as I recall them, based on an advantage, as you call it, of the price in a small area, in Hagerstown, in a year, we would possibly pick up $4,800 to $5,000 additional money.

Q. How much per barrel? A. It would possibly run—I don't really know offhand what it would run in barrelage, because there are a lot of small towns around it and there are a lot of small towns there.

Q. Go ahead. A. If we did apply a mill base in or at the Security Plant, in place of having a gain of $4,800 to $5,000 we would have a loss of $3,000.

Q. By reason of what? A. By reason of selling our product at the most we can get for it and meet the competitive price at Hagerstown.

Q. Is the Hagerstown price based on Unionbridge? A. Yes, sir.

Q. And what is the freight from Unionbridge to Hagerstown? A. Well, I may be four cents off, but I think it is something like 37 or 38 cents.

Q. Per barrel? A. Yes, sir.

Q. On sales in Hagerstown, then, you are able to add that amount to your net realization? A. We are, in some cases.

By Examiner Norwood:

Q. What is the freight from the Security plant at Hagerstown? A. There are three different railroads. One railroad we would only have a switching charge, probably $6.30 a car and $9.20. Another railroad we may have the 17 or 18 cents freight rate, and the third might possibly be 26 cents a barrel. You have several tracks interchanging there." (Tr. 7523-25)

J. L. Nelson, Vice President of Wolverine, testified that neither of the Wolverine mills were base mills and gave as the reason:

"• • • these plants are small plants and are not located close to any large consuming area and that, as a result, any base which Wolverine might establish would affect only a limited territory of small consumption. In addition, the delivered prices in the State of Michigan have been so low that Wolverine has not been able to secure for its cement the prices which it would like to secure. The establishment of a base would have to reduce still further the prices in Michigan in order to be effective." (Tr. 35906)

Dannelly, Vice President, National, cross-examined by Commission Counsel, testified:

"*By Mr. MacIntyre:*

Q. Mr. Dannelly, you stated that you had no base at your Ragland mill, and that if you did make one or put in one there it would not make a marked

difference in delivered price quotations in that particular area. Do you recall that testimony? A. I think I was reading from Clark and Burns testimony there, or Burns and Clark, but I think those facts would be substantially correct, in the area that we serve, not the area immediately surrounding the plant.

Q. What did you mean by the words 'marked difference'? A. Any appreciable difference.

• • •

A. Well, all right. We can make them lower or higher, that is what I testified this morning, and if we made them lower, or if we made them higher, why, the other mills probably would not meet it, we would be high. We would not get any business. We certainly do not want to lower the price. We want to get as much as we can for cement.

Now my idea in bringing out that it would not make any marked difference was that immediately surrounding our plant we did not have enough population to consider giving them any special benefit of the location of our plant. We are not located in the city. We are located in a rural community. There is not a good sized town within 30 miles of Ragland."[15]

McKee, Vice President of West Penn, whose non-base mill is located at West Winfield in Western Pennsylvania, testified that his company was a small company and not an important factor in the markets where it does business[16], and that at its closest market it has only a four cent advantage in freight over competitors.[17] He was asked by the Trial Examiner whether reducing his prices "in any and all cases would reduce your profits". The ensuing colloquy expresses typically the situation of the non-base mill:

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[15] (R.) Tr. 39732-33.

[16] (R) Tr. 27719.

[17] (R). Tr. 27943.

"Trial Examiner Norwood: Do you think that reducing your price in any and all cases would reduce your profit?

The Witness: Yes, because if we reduced our price such a reducton would be met, as soon as known, and those things are known very promptly, and we would get no greater volume, and have our price at that destination, or in that area, reduced, and would suffer thereby, and our loss would be greater.

Trial Examiner Norwood: Do you think, though, that if you contracted for a large volume, at a small price reduction, it would not increase your profits?

The Witness: Well, we never look on any sale from just the standpoint of the one sale. We have to think of its effect on our other customers. We have to think of its relation to what we are going to do for many years to come, and we, therefore, have to treat a problem from the standpoint of the other factors that relate to it.

Trial Examiner Norwood: Well, in sales in your immediate neighborhood, where others would not have an equal advantage with you, would that same condition prevail, where, say, they could not afford to meet the price, or come lower?

The Witness: We have found, from observation, that prices have been met down to what is apparently close to the out-of-pocket cost of production, at least measured by our experience, and the small area to which we have an advantage in freight rate only has an advantage to the extent of a maximum of 4 cents a barrel.

Now, if we reduced our price to 4 cents per barrel above our out-of-pocket cost, which would theoretically be at the out-of-pocket cost of our nearest competitor, we could not expect to continue in business, because we would have all of our overhead and fixed expenses to carry. Therefore, to reduce—experience has shown that you cannot keep anyone out of a territory by reducing the price, unless it goes down to the out-of-pocket cost of the nearest mill, and if we would do that we couldn't continue in business because we would have the 4 cents' freight advantage

that we have at our best possible destination, would be insufficient to carry overhead.

Trial Examiner Norwood: Well, now, suppose that you raised your local price.

The Witness: To give us an exclusive market?

Trial Examiner Norwood: Raised your local price in your exclusive field, where you have the advantage of your competitors as to cost of delivery, wouldn't that give you a little extra profit?

The Witness: A—there will be a meeting of the competitive price down to the out-of-pocket cost. Now, the difference between our—if our out-of-pocket cost is the same as our competitors, which is roughly the case, I presume, at our closest market, we only have a 4 cent advantage in freight.

By Mr. Leisure:

Q. Yes. A. And, hence, if all that we could gain would be a 4 cents per barrel above the other man's out-of-pocket cost, and 4 cents per barrel would only be a fraction of the difference between out-of-pocket cost and total cost, because the items of overhead, financial taxes, and so forth, are so heavy in an industry of this type—therefore, there is no way in which we can keep competition out of our closest and most favorable market without putting ourselves out of business.

Trial Examiner Norwood: Well, do you go out into the other fellow's territory and sell at out-of-pocket cost?

The Witness: We sell in the other man's territory at figures below our total cost.

Trial Examiner Norwood: Yes.

The Witness: But in no case at figures below our out-of-pocket cost.

Trial Examiner Norwood: Well, why do you do that?

The Witness: We do that because if we have a certain volume of business, and we can increase that business, well, say, 20 percent, that extra 20 percent will tend to carry these fixed charges of administration, financial, and taxes, which repre-

sent the difference between out-of-pocket cost and total cost.

Trial Examiner Norwood: And that does not reduce your profit average?

The Witness: That will—that will reduce our losses, because it will give us a greater volume on which to carry these items of fixed expense.

Trial Examiner Norwood: Well, do you have no points of advantage where the other fellow's out-of-pocket cost would give you a small profit?

The Witness: We do have a small area where the other man's out-of-pocket cost would give us 4 cents above our own out-of-pocket cost, but that would still be a very considerable loss under our total cost.

Trial Examiner Norwood: Wouldn't he get tired of that?

The Witness: Well, I don't know. Experience would seem to indicate that there have been certain sections of the country where prices were low for a considerable period, and the history of bankruptcies in the cement industry speaks for itself. There have probably been more bankruptcies in percentage in the cement industry than in any other single group except the coal industry."[18]

The testimony of representatives of other non base mills was similar to that of the witnesses, samples of whose testimony have been set out, and to the reasons given in the Burns Clark Questionnaire answers.[19]

5. How Base Prices Are Used

a. Companies Using Their Own Base Plus Freight

Sixteen respondents have a general policy of determining their prices by establishing a maximum "base

[18] (R) Tr. 27942-46.

[19] See fn. 14, *supra*.

price" at their mill or mills, adding the rail freight (or in some cases, other applicable transportation cost)[1] to the destinations where they sell and quoting the result as their delivered prices, except where those prices are found to be higher than the prices of any competitor, in which event they either lower their own prices to meet the lowest prices found or refrain from quoting at that destination.[2]

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[1] See Evidence respecting truck and barge pricing in Parts VI, E and VII, C, *infra*, and respecting equalization of prices to all competing customers in any given area despite differing transportation costs, Part II, pp. 557-576, *infra*.

[2] Unless otherwise noted, exhibits referred to in this footnote constitute answers to the F.T.C. Questionnaire.

Alpha: Coogan, Vice President (R) Tr. 23050, 23052-53.
Com. Ex. 3152 C.

Huron: Crapo, Vice President (C) Tr. 11428-29.
Com. Ex. 3155 C.

Kosmos: Horner, President (R) Tr. 36812, 37040.
Com. Ex. 3153 B-C.

Lawrence: Ackerman, Vice President (R) Tr. 31202, 31223.
Com. Ex. 3126 E.

Lehigh: Bowen, Vice President (R) Tr. 26615-16, 27108.
Com. Ex. 3143 I, L-M.

Lone Star: Neylan, Asst. General Sales Manager (C) Tr. 6641-42.
Com. Ex. 1112: Pamphlet on Trade Ethics & Marketing Policies.
Com. Exs. 3183 G-J, 3184 E-H, 3185 C-G.

Marquette: Colburn, Vice President (R) Tr. 39959, 39962-63.
Wecker, President (C) Tr. 14039-43.
Com. Ex. 2610 B.

Medusa: Dawson, Vice President (R) Tr. 40056.
Com. Ex. 3118 R.

Missouri: Alexander, President (R) Tr. 37122.
Com. Ex. 3117 D.

Nebraska: Hoenig, Sales Manager (R) Tr. 42015-16.
Com. Ex. 3176 W.

Northwestern States: MacDonald, B. A., Vice President (R) Tr. 36482.
Com. Ex. 3175 C.

The evidence respecting the non-respondents Ideal[3] and Michigan Alkali Co.[4] is to the same effect.

The Commission found that

> "In addition to basing points at mill locations, there are a limited number of basing points used for pricing purposes at locations where no cement is produced. There are also basing points common to a number of different mills; that is, several mills may be located in an area from which the freight rates to other locations are the same regardless of where within the given area a mill is located."[5]

This finding is accepted. Bases at points where there is no cement mill have been limited to locations of silos, warehouses, packing plants, etc.[6] or ports of entry for foreign

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Penn-Dixie: Browder, Traffic Manager (R) Tr. 38486-87.
Com. Ex. 3135 D-E.
Com. Ex. 2850 A-D: Memo from B. S. Smith, President to Members of Penn-Dixie, Dec. 17, 1928.

Three Forks: Com. Ex. 3176 FF.

Universal Atlas: Affleck, President (R) Tr. 34831-32, 34838.
Stone, Vice President (C) Tr. 474-75.
Com. Ex. 3141 A.

Vulcanite: Com. Ex. 3128 C, G.

Whitehall: Elliott, Vice President (R) Tr. 28496-97.
Com. Ex. 3164 D.

[3] Com. Ex. 3176 G: Answer to F.T.C. Questionnaire.

[4] Com. Ex. 3131 C: Answer to F.T.C. Questionnaire.

[5] Findings, Par. 7(d).

[6] These bases were established primarily for truck delivery. See Part VI, B, 2, F.

The points included:

Cleveland and Toledo, Ohio; Muskegon and Saginaw, Mich.; Green Bay and Milwaukee, Wis., Buffalo and Oswego, N. Y., and Duluth, Minn.

Meyers, Traffic Manager, Huron (R) Tr. 33398, 33437, 33418-19, 33408-09; Resp. Exs. 455, 457.

cement.[7] The evidence respecting the bases which are common to several mills by reason of freight rate groupings is briefly summarized beginning at p. 425, *infra*.

Representative of the practice of the companies which determine their prices by adding transportation cost to a "base price" is the statement by B. S. Smith, then President of Penn-Dixie in a memorandum "To Members of Penn-Dixie Corporation" dated December 17, 1928, in evidence as Com. Ex. 2850 A-D. Liberal excerpts follow:[8]

> "It is desirable that this corporation have in written form for the information of everyone a definite statement of our policy with respect to prices, how prices are made, terms upon which they are made and the basis of our prices in effect from time to time.
>
> It is essential that we know at all times the prices quoted by our competitors for cement at all points where we desire to sell. We must make as low prices as our competitors at any point or we cannot sell any cement at that point. Therefore, it is expected that our salesmen will report carefully and constantly the delivered prices made by competitors, of which they learn from dealers in and users of cement.
>
> PRICE CLASSIFICATION: In our business we frequently use the terms 'delivered price' and 'base price.' Shipping points at which there are in effect 'base prices' are referred to as 'basing points.' The price of cement delivered at point of use is generally referred to as 'delivered price.' A 'base price' is a mill price which is used in determining delivered prices.

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[7] See Section E, "Arbitrary" or "Special" Prices, pp. 576-587, *infra*; and Part XVI, Imported Cement. The points included: Wilmington, N. C., Charleston, S. C., Brunswick and Savannah, Ga., Mobile, Ala., Miami, Pensacola, Panama City, Port St. Joe, Jacksonville; Resp. Exs. 455, 457, 1298, 903, 1286, 1199 B, 2909; Com. Ex. 586-4 L.
Browder, Traffic Manager, Penn-Dixie (R) Tr. 38299-303.

[8] To the same effect see Com. Ex. 3135 D-E, Penn-Dixie answer to F.T.C. Questionnaire (1931).

DELIVERED PRICES: A purchaser of cement wants to know the cost to him of cement at the place where he proposes to sell or use it. It is a matter of considerable inconvenience and difficulty for a buyer of cement to ascertain the freight rates from all the mills serving a market to the place where he wants the cement. Therefore, in asking for price, the buyer habitually asks for price delivered at point of use. So general is this that it has become our custom to quote delivered price not because this is of any advantage to us but because it is desired by the customers.

Our Price Is Our Mill Price Plus Freight: The price which we quote our customers on our cement delivered at any place is our price at our mills in the Lehigh Valley or at Kingsport and Richard City, Tenn. and Clinchfield, Ga. plus the freight from these mills to the point of delivery, except as explained hereafter.

This practice gives to everyone similarly situated the same price and it gives to people in different localities prices which bear a fair relation to each other. There are certain localities, however, usually in and around competing plants where we find competitors consistently making lower price than our price arrived at in the manner explained. This condition is considered later in detail under the heading of 'EFFECT OF COMPETITION ON PRICES.'

BASE OR MILL PRICES: For our own use we must have a price at the principal mills where our cement is produced. We try to make this a fair price based upon cost of manufacture, competition, and the other elements which enter into the establishment of price by a manufacturer. This price is referred to as a base or mill price and is subject to change from time time to time as conditions warrant.

EFFECT OF COMPETITION ON PRICES: *When our mill price at our mills stated above plus freight is higher than the established price of competitors in any locality, we usually reduce our delivered price in*

such locality to the lowest established price of our competitors.

In order to broaden our markets and insure a more uniform and certain disposal of our output, we have found it necessary to sell a part of our product in such localities at prices lower than we consider our normal price. We therefore lower the price of our cement delivered in such localities to meet the lower price of our competitors but in so doing we still are treating everybody in such locality alike.

When our salesmen report the prices quoted by competitors at a number of points, we deduct from such price at each of these points the freight rates to such point from all mills serving that territory. If the result in each case is the same at some one mill then it is clear that such result is the base price of such competitors. Then if we take that base price and add the freight from such base point to any other point we are interested in the result will be the price of such competitor at such point. If such price is lower than our price made up of our mill price at Lehigh Valley, Kingsport, Richard City or Clinchfield plus our freight to such point, then it is clear that we must shrink our price to meet such competitor's price or we shall not be able to sell cement at such point.

Again, when we want to put into the hands of our salesmen the prices at which we wish to sell our cement to meet the competition of other manufacturers, it is convenient to inform our salesmen what is the basing price of a competitor and that we will sell at a delivered price calculated by adding to such base price of our competitors the freight rate from such base point to point of delivery.*

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*To the same effect as this memorandum was Penn-Dixie's response to the F.T.C. Questionnaire, asking for a "full explanation of your methods of determining delivered prices * * * when submitting sealed bids, or when meeting other competition," and which concluded:

"As stated, the delivered prices of all companies at different points are well known at all times and by deducting railroad

Freight rates are fixed; published and known to everyone. It is, therefore, a much easier and more convenient way of informing our organization of our prices than by giving specific price at each one of several thousand points where we sell or are seeking to sell our cement. This method is not unlike the use of code words in telegraphing.

We emphasize that we do not, as is sometimes asserted by those who desire to create prejudice against the cement industry, really charge for our cement, delivered at any point, the freight between certain points, when the cement does not move between those points at all. We do not require the customer to pay a fictitious freight rate. We charge for our cement the price at our mills at Lehigh Valley, Kingsport, Richard City or Clinchfield plus the freight to point of delivery; or if this proves to be higher than the established price of a competitor to that point, we usually shrink our price to meet the price of such competitor. In the latter case the price is forced upon us by the keenness of competition and we make such price to meet that competition. In essence, it involves nothing but the necessity of making price as low as competitor's price. When in such cases we use competitor's base price and the freight from its base point to point of delivery, it is merely a method of easy computation in

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freight rates, which are published and well known, from producers' plants to points of delivery we readily determine what each company's base price is at its mill. In instructing our organization from time to time as to what our prices are, we do not list the delivered prices at each of the thousands of delivery points where we are selling or seeking to sell, but instead use an easier and simpler method. Thus knowing what our competitors' base prices are, we give these base points and prices, together with the published freight rates from such base points, to our organization from which they can readily figure by the above mathematical shortcut the competitor's prices at each delivery point, and which prices they are usually instructed to meet." (Com. Ex. 3135 A-E; Wing, Vice President (C) Tr. 8098-99)

order to arrive at what we believe to be competitor's price. It is that and nothing else.

SALES POLICY IN RELATION TO PRICES: The essentials of our sales policy as related to prices are: Making an equal price to all similarly situated; meeting the desires of cement users by quoting a delivered price; constructing such delivered price by adding to our base price at Lehigh Valley, Kingsport, Richard City and Clinchfield the freight rate therefrom to point of delivery and in order to sell our cement in localities where competitor's prices are lower than our base price plus freight shrinking our base price so that such price plus freight will meet the delivered prices of competitors.

• • •

As we have stated, the Pennsylvania-Dixie Cement Corporation adopts a price at its mills at Lehigh Valley, Kingsport, Richard City and Clinchfield and then generally speaking quotes a delivered price at different points made up of its mill price plus freight from there to point of delivery. It holds to that policy in quoting delivered prices at all points around its mill until it reaches points of such a distance from its mill that a price made up thus becomes greater than the established price which it finds its competitors are quoting. It never makes a price at any point greater than is produced in the manner stated."

Penn-Dixie's Vice President and General Sales Manager, Walter Wing was questioned by Commission Counsel as to whether he had any discretion in price making and what instructions he had from his "executives" in the way of price making. He testified:

"As the result of information that I give them, they tell me what price the sales department will quote or accept.

Q. Do you mean what price you will adopt at your mill? A. It might be, or, whether we will meet competition based on other mills.

Q. Do you go to them with every particular case of that sort that comes up? A. No, sir.

Q. Then to what extent do you exercise your own discretion in making or meeting prices? A. I do not have any discretion to meet prices.

Examiner Norwood: Do they give you some formula for figuring up prices?

The Witness: Yes, sir.

Examiner Norwood: What is it?

The Witness: Based on this evidence that was produced this morning, your Honor.

By Mr. Wooden:

Q. Do you mean by that that you have instructions to put your base price into effect at certain mills and then calculate your delivered price by adding the freight to it? A. Yes, sir.

Q. And when you go into territory where other base prices are, the prices of other mills, are in effect, that you equalize your delivered prices with theirs? A. Yes.[10]

• • •

[Italicized part quoted in Fdgs. Par. Seven (f)]

Q. Will you explain, Mr. Wing, what it is that determines which base price shall be applicable at a given destination? A. The one that makes, with the freight rate, the lowest destination cost."[11]

On cross examination he testified:

"Q. Now, Mr. Wooden asked you if when you sell in a competitor's territory, whether you equalize your delivered price with their's, and I think you said yes. Do you mean by that that you meet the competitor's price if you want the business when you say you equalize your price? A. We have to.

Q. You meet the lowest price if you want the business? A. Yes, sir."[12]

Browder, Traffic Manager of Penn-Dixie, testified that its prices are not always the equivalent of a base price plus

[10] (C) Tr. 8125-26.

[11] (C) Tr. 8136.

[12] (C) Tr. 8158.

freight rate; that they were so constructed except where there were "arbitrary prices" such as in New York and Boston.[13]

Reference to the evidence respecting those companies which follow substantially the same practice as that outlined in the Penn-Dixie Memo, *supra*, is, in brief, as follows:

ALPHA

"The delivered price for our cement is determined by adding to our base price from that one of our mills which will give the lowest price at the given point, the freight as established by published railroad tariffs. This price is modified downward to meet competitive prices as we find them at that point, so long as the net received is not below a certain figure which is in each individual case, left to executive discretion. This minimum net price is changed from time to time in accordance with various factors."[14]

Coogan, Vice President of Alpha testified:

[Italicised part quoted in Fdgs. Par. Seven (f)]

"Q. Mr. Coogan, today how do you determine the delivered prices which you quote? A. We determine our delivered prices by the use of certain mill base prices plus the freight rates to the particular destination using the lowest combination of mill base and freight rates which we arrive at, at that particular destination.

Q. Does your particular company use basing points in calculating your delivered prices, if so, will you tell us to what extent? A. We do. We use basing points. We use them almost entirely, in fact, almost entirely. There are some few exceptions where you might have, as has been the case, in the past years, where, in order to meet foreign competition there have been, what I call, 'arbitrary prices' in certain sections. You will find that once in a while, in order to meet a local competition, or local com-

[13] (R) Tr. 38486-87.

[14] Com. Ex. 3152 C.

petitive situation, there are some prices which are not based on some of the mill basis plus freight rates, but, generally speaking, all of our destination prices today are made up on the bases of mill basis plus freight rates to destination.'"[15]

Asked to explain Alpha's pricing method Coogan, testified further:

"* * * the Alpha Portland Cement Company always means to quote a price at every destination where we quote which is at least equal to the lowest price quoted by any other competitor at that destination and if we succeed in doing that, we feel that that is meeting competition.

Q. You use the term 'basing point,' and it has been discussed a great deal. In order that I may ask you further questions about that, may I ask you what you mean when you use the term 'basing point'? A. At our mills, we have, with one or two exceptions, we have a set price which we feel we would like to get at that particular mill and we use that figure plus our freight rate in arriving at the destination price, which we are quoting unless we find that a mill price of some other mill plus the freight rate from their mill makes a lower price at that destination, in which event we use the lower price."[16]

On cross examination Coogan was examined as follows:

"Q. But haven't you testified to using base prices of other mills in figuring out your delivered prices at particular destinations? A. Yes, sir; and we do.

* * *

Q. And it was your practice and policy not to quote below the delivered prices composed of those base prices plus freight?

* * *

A. It was our policy not to quote below the lowest price we found at any destination.

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[15] (R) Tr. 23050-51.

[16] (R) Tr. 23052.

By Mr. Woodley:

Q. Is your answer to my previous question 'yes' or 'no'?

* * *

A. That is true, if we found that was the lowest price at that destination." (Tr. 24474-76)

Coogan said that two of Alpha's mills were not base mills and at those mills "we simply follow the prices which we find at the various destinations served by that mill."[17] Alpha has used this method of quoting with certain variations for "more than twenty-five years."[18]

Kosmos

Charles Horner's stipulated testimony was that:

"Kosmos has a maximum figure at its mill, to which in quoting its delivered prices, Kosmos adds the package charges and the freight rates. This combination is the lowest delivered price at a number of destinations in the territory around the Kosmos mill. At many other points Kosmos finds lower delivered prices quoted than it would quote, and Kosmos meets such lower prices. At such points Kosmos is merely a price follower. In some instances we have sent out quotations at prices which were not the same as the lowest quoted prices in the market, but in general we have met the destination prices as we have found them.

In arriving at its delivered prices for the various destinations where it sells cement Kosmos recognizes that the market price at many points usually reflects some base or basing point. Kosmos, however, quotes the lowest quoted price at each point where it sells cement regardless of whether or not the delivered price appears to reflect a base." (Tr. 36812)

On cross examination Horner said Kosmos finds that prices are usually made by taking a base figure and adding the

[17] (R) Tr. 23052-53.

[18] (R) Tr. 23059-60.

freight rate to it, and that in default of more definite information from the destination point "we attempt to forecast our competition that way."[19]

Answering the F.T.C. Questionnaire in 1931 Kosmos said:

> "We know the freight rates from competing mills to any particular point in our territory. From our dealers and our salesmen we pick up our competitors' quotations from time to time and from these quotations we can ascertain what mill bases are being used. We are then in position to make our prices to meet the competition at the particular time and place in question." (Com. Ex. 3153 B)

Lehigh, answering the F.T.C. Questionnaire:

> "(When meeting other competition) The delivered price of Lehigh Cement is derived or calculated from a maximum mill net at each plant. The maximum mill net is that remainder which the Lehigh Company believes it should properly receive for its product after all freight, package charges, and discounts have been deducted.
>
> In arriving at a delivered price per barrel the Company adds to its maximum mill net the published freight rate per barrel for rail or water delivery to destination. In the event that lower competitive prices are openly quoted at the delivery point for which a Lehigh quotation is to be made, the Company thereupon decides whether or not it will reduce its maximum mill net on deliveries to that particular destination. If the Company elects to make a lower price, the Company thereupon issues a quotation for its product at a lower delivered price per barrel." (Com. Ex. 3143 I)

Vice President Bowen of Lehigh asked how Lehigh arrived at its delivered prices, testified:

> "A. We find the destination price at every destination at which we sell, or are trying to sell, and our

[19] (R) Tr. 37040.

quotations to our customers are at that destination price. (Tr. 26611)

* * *

A. * * * in most cases that delivered price is a price that has originally been quoted by our company which represents the return to us that we would like to get at the time on all the cement we sell, if we could. At other destinations that market price is a price originally quoted by some competitor which we either meet or refrain from quoting." (Tr. 26612)

LAWRENCE:

Ackerman, Vice President, testified that:

"We quote a price which we believe to be the market price at the destination in question. Sometimes that price will reflect a base at our own plant; other times it may reflect a base at a competitor's plant. Sometimes no base is reflected. We quote a price depending on the conditions in the market, which conditions affect the market."

He defined "market price" as "the highest price which we can obtain in the market" (Tr. 31223).

HURON:

In answer to the F.T.C. Questionnaire in 1931 Huron said:

"The Huron Company makes prices on cement delivered at point of destination, and in arriving at such figure, adds to its base price the transportation charges exacted to reach destination. When some competing base price, plus its price of transportation from such competing mill, to any desired destination, is less than the Alpena base price, plus the transportation from Alpena to such destination, the Huron quotes the lesser price, if such lesser price, less the transportation charges from Alpena to such destination, leaves the price recoverable by the Huron sufficient to be desirable to the Huron Company.

During 1929 and 1930, the consuming territory was very limited in which the Huron Base Prices gov-

> erned. In 1931 competing mills, with or without Base Prices, made prices lower than Huron Base Prices, plus transportation from Alpena, so that the Huron Base Prices were in a great measure ineffective, and Huron was forced to meet the competing prices in many instances in order to sell its product. The changes in basic prices in 1931 are exhibited in detail on the maps heretofore furnished the Commission."[20] (Com. Ex. 3155 C)

MARQUETTE:

Colburn, Vice President, testified that that company has a mill net which it uses in determining its delivered prices and that it uses this mill net that it wants to get and adds to it the rail freight to the various destinations.[21] He said further:

> "That is what we want to secure. We, however, run into cases where other companies have quoted a delivered price which was less than the one we had computed in that case, and in that case we must meet that delivered price. We cannot get more than they get." (Tr. 39963)

Colburn said he did not call Marquette's mill net a "basing point" but that he has "heard them called basing points".[22] Marquette has figured back from delivered prices of competitors that were lower than its prices to find out whether such prices did not reflect a constant figure at some mill and, having found such a constant figure, used that to try to determine what their delivered price would be at the same points Marquette quoted by adding the rail freight from the competitor's mill. Marquette's quotation would be made up and issued accordingly.[23] When Marquette figures back in this fashion

[20] The maps referred to are in evidence as Com. Exs. 1375-76.

[21] (R) Tr. 39959, 39962-63.

[22] (R) Tr. 39959-60.

[23] (R) Tr. 39963.

and does not find any constant mill net it ignores it and bases its prices only upon the cases where its calculations show that a constant mill net is reflected.[24]

MEDUSA:

In reply to the F.T.C. Questionnaire in 1931, said that it determined its prices as follows:

> "(1) When destination to be served is in the vicinity of one of our plants that might have an established base price, we employ the combined base price plus freight charge from our mill to the point of destination.
>
> (2) The use of competitors last known base price, plus freight charge from his mill to same point of destination.
>
> (3) In some instances arbitrary prices have been established and announced through quotations to the trade. These arbitrary prices do not in any way agree with any combined base price plus freight charge to the particular destination.
>
> The lowest price affected by the three factors mentioned above represents the price which we will quote at destination, exclusive of containers provided the net price is acceptable to us." (Com. Ex. 3118 E)

Dawson, Vice President of Medusa, testified that Medusa is generally a "price follower and meets prices quoted by its competitors as long as it wishes to retain its identity in a given market, that is, until prices become unprofitably low in the market."[25] He also testified that from time to time Medusa had set a maximum mill net at its various mills and that "today all of its mills are so-called base mills" but that:

> "In arriving at its delivered prices for the various destinations where it sells cement, Medusa rec-

[24] (R) Tr. 39965.

[25] (R) Tr. 40052.

ognizes that the market price at many points at times reflects some base or basing point. Medusa, however, quotes the lowest quoted price at each point where it sells cement regardless of whether or not the delivered price appears to reflect a base." (Tr. 40055-56)

To substantially the same effect as the foregoing excerpts is the evidence respecting Lone Star,[26] Missouri,[27] Nebraska,[28] Northwestern States,[29] Three Forks,[30] Universal-Atlas,[31] Vulcanite,[32] and Whitehall.[33]

b. Group Bases

As found by the Commission[1] certain mills are so closely grouped that they have common freight rates to all or to most destinations where they sell. Writing to Dr. Burns in 1935, D. S. Browder, Penn-Dixie Traffic Manager, listed such groups east of the Rocky Mountains as follows:

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[26] Com. Exs. 3183 G-J, 3184 E-H, 3185 C-G, and others referring to pp. 21-27 of Com. Ex. 1112, Lone Star's Pamphlet on Trade Ethics for explanation of the company's pricing.
Koch, Vice President, Lone Star (R) Tr. 33210.
Neylan, Asst. General Sales Manager, Lone Star (C) Tr. 6021, 6641-42.

[27] Com. Ex. 3117 D.
Alexander, President, Missouri (R) Tr. 37122, 37309.

[28] Com. Ex. 3176 W.
Hoenig, Sales Manager, Nebraska (R) Tr. 42015-16.

[29] Com. Ex. 3175 C.
MacDonald, B. A., Vice President, Northwestern States (R) Tr. 36482.

[30] Com. Ex. 3176 FF.

[31] Com. Ex. 3141 A.
Affleck, President, Universal Atlas (R) Tr. 34831-32, 34837-38.
Stone, Vice President, Universal Atlas (R) Tr. 35298-99.

[32] Com. Ex. 3128 G.

[33] Com. Ex. 3164 D.
Elliott, Vice President, Whitehall (R) Tr. 28496-97.

[1] Fdgs., Par. 7(d).

1—Lehigh Valley District consisting of 27 mills.

2—Kansas Gas Belt Group, consisting of Iola, Chanute, Humboldt, Fredonia, Independence, Mildred, Kansas, and Dewey, Oklahoma.

3—Hudson River Group, consisting of Hudson, Hudson Upper, Alsen, Glens Falls, and Howes Cave, N. Y.

4—Kansas City Group, consisting of Sugar Creek, Missouri and Bonner Springs, Kansas.

5—St. Louis Group, consisting of Continental and Prospect Hill.

6—Birmingham Group, consisting of North Birmingham, Boyles, and Phoenixville. (Com. Ex. 971-4 V-X)

At each of these points is located one or more mills of companies who determine their prices by adding freight to a base figure. This fact was recognized in the Burns and Clark Questionnaire, at the outset of which the following note appeared in connection with the question as to whether a mill was or was not a basing point (See *e.g.* Com. Ex. 976-5 G):

> "NOTE:—All mills located in a group should be considered as base point mills when identical freight rates apply from all mills in such group (except to short haul destinations) and when one or more mills in such group are base point mills."

In addition to the groupings listed by Mr. Browder, above, the questionnaire included "for illustration": the "La-Salle-Oglesby Group", the "Portland-Concrete, Colorado Group" and the "Colton-Crestmore California Group" (Id.).

In this respect, the prices of Coplay, Edison, Giant, Hercules, Keystone and Nazareth, all of which operate mills in the Lehigh Valley,[2] reflect the Lehigh Valley base

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[2] Bowen, Vice President, Lehigh (R) Tr. 26674.

by virtue of their location. The prices of Ash Grove at Chanute, Kansas, Monarch at Humboldt, Kansas, Consolidated at Fredonia, Kansas, Universal Atlas at Independence, Kansas and Dewey at Dewey, Oklahoma, all in the Gas Belt,[3] reflect the bases of the Gas Belt.

In addition Aetna and Peerless have substantially common rail rates with Huron silos operated as bases at Saginaw and Detroit respectively;[4] Trinity mills at Houston and Eagle Ford, Texas have common rates to many points with the Lone Star base mills at Houston and Dallas, respectively.[5] Superior is on a substantially common rate basis as the Alpha mill at Ironton, Ohio[6] and Federal, near Buffalo has rates common with the Great Lakes and the Huron silo base there.[7]

The specific evidence regarding the use of basing points by these companies in pricing is in brief as follows:

LEHIGH VALLEY:

COPLAY

J. F. Twamley, Vice President of Coplay, testified that Coplay's mill is "practically" a basing point mill "on account of our proximity to Northampton, which is a basing point. We are within a mile of Northampton, and our freight rates are, I believe, practically the same." Twamley stated that Coplay uses "the Northampton rate in arriving at" its prices (Tr. 6743).

Examined further on the point by the Commission Counsel he testified:

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[3] Com. Ex. 3247, page 1: Texas Rate Book.

[4] Calvin, President, Aetna (R) Tr. 30044-45.

Com. Ex. 1110 L: Michigan Rate Book.

[5] Com. Ex. 3247: *Supra.*

[6] Com. Ex. 1110 W: Ohio Rate Book.

[7] Bates, J. E., Sales Manager, Federal (R) Tr. 30510-11.

"Q. Is your delivered price within the Lehigh Valley district the same as the delivered prices of other mills at given destinations within the district? A. Well, I know of no discrepancy.

Q. Is the delivered price of other mills within the district figured on the Northampton as a base? A. I don't know. (Tr. 6744)

* * *

Q. How do you arrive at the base price that you put into effect? (Tr. 6748)

* * *

A. * * * my answer is that I haven't anything to do with the base price." (Tr. 6749)

Twamley was then examined as follows on his statement that "we do not consider our mill a basing point":

"Q. What is the price at your mill? A. Well, we consider our base $1.65. We have no price at our mill. We make our price at our nearest railroad station, delivered.

Q. That is $1.65? A. It would be figured on $1.65 plus freight from Northampton. We use those rates. That is the price, exclusive of package.

Q. When you say you do not make a base price, what do you mean by that: that you never initiate a change in the price prevailing in the Lehigh Valley? A. That is true.

Q. You just follow along and adopt what prices are named by others? A. That is true. (Tr. 6750)

* * *

Q. When you go into territory where other base prices prevail, do you make it a practice of meeting the delivered prices in that territory? A. We do." (Tr. 6752-53)

Edison (Com. Ex. 3114 D, Answer to F.T.C. Questionnaire):

"*Method of determining Sales Prices*

Having first ascertained the Base Prices effective throughout the part of the country in which we

operate, the delivered price for a certain territory is determined by adding to the Base Price, for that territory, the actual rail freight rate to the point of delivery, and the price of the containers. The total of these items, Base Price for the territory, Freight to the point of delivery, and the Price of Containers, constitute the delivered price of cement.

The foregoing method is used providing there are no arbitrary delivered prices in effect at any of the destination points. In territories where arbitrary prices apply, we usually secure the delivered prices being quoted by other companies, and where such prices would make it unprofitable for us to quote we simply do not seek the business."

F. A. Sweeney, Vice President of Edison, testified "we are essentially price followers", that we ascertain what the lowest quoted prices are in the field through our salesmen and customers, and attempt to meet those prices if we want the business" (Tr. 35636, 35639). As to using basing points, he testified:

"I would not say that we use basing points as such. What we do is to ascertain what the lowest competitive prices are in the field, and from long experience in the business we generally figure that any change upward or downward, general changes are traceable to an arithmetical relationship to a constant mill base price at some mill. While we pick up a number of destination quotations by competitors, we do not actually check prices from every destination. After we have checked a number of them and satisfied ourselves that such a constant base price is in effect, why, we quote our prices in that area accordingly, assuming that they are correct.

Q. Do all the prices quoted by your company relate back to some base figure, as you have described it? A. No. Some areas have what we call, or what we term arbitrary prices which are not traceable to any constant mill base.

Q. Has there even been a time during the past, well, let's say 15 years, that all of the prices quoted

by your company related back to some base figure? A. No, there has not.

* * *

If the quotations we find in the field are traceable to arithmetical relationship to a constant mill base price, we recognize that mill as a base mill. If such destination prices are not traceable to any constant, we accept those prices as arbitrary prices." (Tr. 35643-49)

GIANT (Com. Ex. 3125 D, Answer to F.T.C. Questionnaire):

Stated that its delivered prices

"* * * are determined upon consideration of—current quotations by competitor companies; Published freight rates establishing base prices".

HERCULES (Com. Ex. 3144 B, Answer to F.T.C. Questionnaire):

Stated that in determining its delivered prices "we keep in touch with the market through reports from our Sales Force and friendly customers, and with this information constantly check the quotations made by our competitors and are governed accordingly."

Brobston, Hercules President, testified as follows:

"Q. What is the price policy of your company? A. Our policy is to have one price to every customer in his own market. That is, we only have one price for any market.

Q. And with respect to competitor's prices, what is your policy? A. We meet the prices that we have to meet in order to compete and get the business.

Q. What prices in your long experience do you have to meet in order to get any business? A. We have to meet the lowest price that we find in any market in order to get the business.

Q. Is there anything of any kind which prevents you from selling at any price that you please,—either upward or downward? A. Well, there is a price that prevents me from going up, because I can't sell cement. There is absolutely no reason under the sun that I couldn't bring the price down." (Tr. 26127)

Asked to what extent Hercules used basing points Brobston testified:

"A. Well, basing points, to me, are merely points from which we can figure what the delivered prices of our competitors are, Mr. Leisure. We have always used those points to figure out the delivered prices that we had to meet.

Q. Now, can you tell,—or do you know how your competitors arrive at prices quoted? A. Well, you mean the delivered prices quoted?

Q. Yes. A. Why, I have always found, ever since I have been in the business, that those prices were at a fixed price at such basic point, plus the freight to destination.

Q. Well, now, in actual experience, in checking back these quotations which you pick up,—are you only interested in the so-called base mills, and what they are quoting, or are you concerned also with the prices quoted by the non-base mills? A. Well, we are concerned with any delivered price that is quoted, whether it was quoted by a base-point mill or any other mill. The thing we are interested in is the delivered price that is being quoted by our competitors.

Q. Can you tell, and, if you can, will you tell us how you determine whether or not a price that is quoted is made by a base mill, or a non-base mill? A. Well, from my experience I know that in general—any general change is a change in the base price at some mill, but there are a good many cases where mills have put in individual prices that are not directly related to any base. For want of a better word, we call them arbitraries." (Tr. 26083-84)

KEYSTONE (Com. Ex. 3146 C, Answer to F. T. C. Questionnaire):

"As the production of our one plant represents such a small percentage of the total production shipped into the territory, which our freight rates permit us to reach, our maximum price is limited to the level established by our principal competitors. As changes are made, from time to time, by such com-

petition, which we are quickly able to develop from quotations in the hands of the trade as reported to us by dealers and our own salesmen, we are able to promptly develop the mill base prices which they are using and if, after deducting the freight rate from our mill to a given destination, a satisfactory net price at Bath results to us then we meet such competition."

Scott, Keystone President, gave the following testimony before the Senate Committee on Interstate Commerce:

"To get back to the method of quoting and selling our cement in competition with other American producers, we do not use any artificial bases or 'phantom' freight rates; in the last essence we do not use what might be termed a basing-point system. Instead, we quote delivered prices because a contractor or building material dealer is interested in knowing what the cement is going to cost him delivered at his warehouse or work site, and not what it is selling for at the mill. There are, at present, I believe, about 163 cement plants in the United States, and as was previously pointed out, there are about 35 in the East, some 20 of which are concentrated in the Lehigh Valley area. Practically every mill is a base point, and certainly every large producing group or area is a base. Accordingly, as we may submit a quotation on our cement at any given destination or for any job, we establish the freight rate from the various producing mills normally shipping to this location. We are in constant knowledge of base prices which various manufacturers may be using at their plants, through quotations picked up in the field by our salesmen, through public bids, through trade magazines, and so forth. Therefore, to the base prices are added the freight rates from such mills and the lowest combination represents the lowest price—that is, a combination of freight and cement price—which may be offered for this given order or given destination, and if this price nets us a sufficient amount at our mill then we quote and solicit such business." (Resp. Ex. 1415, p. 641)

Mr. Scott testified before the Commission as follows:

> "Q. How do you determine the prices at which you will sell your cement at any particular destination? A. Well, it is our custom to meet competition at destination as we find it. We have to do that or we cannot compete. We cannot get any premium for our product.
>
> Q. How do you find what these competitive prices are at destinations? A. Well, that is very simple, because the quotations are broadcast by various competitors. They are named on jobs as they come up; our salesmen pick up those quotations; dealers may send them in, or telephone us." (Tr. 27495)

This information is recorded on price cards and prices are quoted therefrom.[8]

If Keystone has no price card for a given destination, Mr. Scott said they then "would refer to our freight rates, and work out a combination of the going base prices effective in that area, with the going freight rates, and quote the lowest combination" (Tr. 27496).

Nazareth (Com. Ex. 3127 D, Answer to F.T.C. Questionnaire). Explaining how it determines delivered prices:

> "It is a necessary part of our selling procedure to keep ourselves informed of competitive prices as they exist in the field. We do this through our field force and our District Sales Managers who check the prices constantly with our retail dealers in the various localities.
>
> In event of our discovering a competitive price lower than ours, it is a matter of comparatively easy procedure to check the freight rate from the particular destination back to that competitor's mill. At the same time, check two or three other points and you can generally arrive at the basis on which a competitor is quoting.

[8] (R) Tr. 27496.

When quoting generally or in filing a sealed bid, we can only go on the last information we secured from the field and calculate our price accordingly."

Robeson, Vice President and General Manager of Nazareth, testified as follows:

"Q. How do you determine, Mr. Robeson, the price at which you will sell cement at any particular destination? A. Well, in a sense, you do not determine it. It is determined for you by the competition that you find at that destination. In other words, it is then up to me, as a matter of policy, to advise my staff whether or not we will meet those prices.

Q. Do you meet all those prices? A. We meet any prices that we know are actual prices. In other words, particularly published prices as we can find them in the field. (Tr. 28005)

* * *

Q. Taking up the subject of basing points, which has been discussed here on the record: There is evidence that some of the companies do check quotations which their salesmen gather in the field, that they do make that check in order to determine how the issuing company figured its price.

Do you follow any such practice, Mr. Robeson?

* * *

A. What we do, when we have these notifications of price from our field force we check a sufficient number of points to give us some information so that we can figure a trend, then we check those prices back to see whether they work up to some figuring point. If we find they work back to a constant, then we figure that competition used that figuring point, and used that price as a figuring point; used that as a start.

Q. Well, to what extent, if any, do you use basing points in the computation of your prices, Mr. Robeson? A. Only from the standpoint of a figuring point, your competition starts out in the field, and it works back to the figuring point, so there is nothing more than a quick calculation.

Q. Well, how do you know how they arrive at the prices? A. Well, you don't know, except that you find your destination prices, and if you work them back to a constant, and then work back to the constant figure, then your experience comes to your rescue, then, and you figure that they use that as a figuring point and work their prices from there.

Q. Now you have told us your practice in picking up these prices in the field. When you do pick them up are you concerned alone with what base mills are quoting? A. No, we are only interested finally in what the price is at destination. That is what we have to meet, if we want to partake of the business." (Tr. 28012-14)

THE GAS BELT:

The Ash Grove mill at Chanute, Kansas, the Monarch mill at Humboldt and the Dewey mill at Dewey, Oklahoma, are all in what is called the Gas Belt. To the extent that Lehigh with its mill at Iola or Universal Atlas with its mill at Independence set maximum nets or bases at their mills and add freight for pricing, they are accordingly reflected at the named mills of Ash Grove, Monarch and Dewey. The specific other evidence of these companies as to their use of basing points in pricing follows:

ASH GROVE:

Sunderland, President of Ash Grove, testified that there were certain markets where his company "sets the price" and that Ash Grove establishes a "maximum net, which when added to the freight rates to a certain market territory determines the lowest price at the points affected thereby" (Tr. 13644, 13738). He stated further that Ash Grove determines its prices "by what we find in the field that we have to compete with" (Tr. 13640, 13739).[9]

[9] A more complete explanation of Ash Grove's pricing by Mr. Sunderland is set forth in his letter to the F.T.C. in 1930, set out at p. 342, *supra*.

DEWEY:

In answer to the F.T.C. Questionnaire in 1931, Dewey explained its method of determining delivered prices as follows:

> "By information which comes to us direct from dealers or from our traveling representatives we are advised what prices are being made by our competitors, which prices we are forced to meet inasmuch as Portland cement is a standard commodity, for which standard specifications are fixed by the American Society for Testing Materials and the United States Bureau of Standards." (Com. Ex. 3150 D)

Capen, Vice President and Sales Manager of Dewey's Davenport, Iowa plant, testified that it ascertains its delivered prices

> "by picking up quotations in the field and working back from the quotations to determine the price base."

and then "to other destinations"

> "we apply the lowest combination of freight and price base, whichever makes the lowest price."[10]

Tyler, Dewey's President testified that his company has

> "never had but one policy in the 32 years that I have been the head of the Company * * * making always an intense investigation as to what cement is selling for at the market price at destination, and then getting as much money as we could for it considering that price."[11]

He said he did not recognize such a thing as basing points and non-basing points[12] and explained as follows:

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[10] (C) Tr. 12666.

[11] (C) Tr. 14282-83.

[12] (C) Tr. 14281.

"Q. You figure back to find out what basing prices are from such information as you can get about delivered prices? A. If after we see what others have quoted at destination——

Q. At certain destinations?

Mr. Zimmerman: Let him answer.

A. We could figure back to freight and find out what the maximum net would have been for some company at some other place.

By Mr. Wooden:

Q. And then after you find that out, then do you add the freight from that company's mill to destination? A. We do not. We do just the reverse, Mr. Wooden. Instead of starting at what you call the base point, and I call it—I will again say that it is nothing but a misnomer—we start by finding out the price at destination first and then regardless of the base, because there is no telling where the prices would come from, they don't necessarily come from a base point at all. They may come from many other mills that don't have a so-called basing point. We go back—we trace it from the destination point back rather than starting at any base point and making a price.

Q. But, unless you were figuring back on a base point mill, you would never get any common price, would you, from different destinations? You would get a long string of variations that wouldn't mean anything from a non-base point mill, wouldn't you? A. Well, Mr. Wooden, I don't know what you would mean by a common price, but very much of the time this business has no common price.

Q. Well, I mean simply where the same mill net repeats itself to the same mill regardless of destination. A. It could be true.

* * *

Trial Examiner Norwood: Let the witness answer the questions.

A. It is true, Mr. Wooden, that there would be times where we would ship the cement, when we would

get the same maximum net for it one time or another, but I will state again that we have never in 32 years had anything but the policy of finding out the price at destination and then doing the best we could to make some money."[13]

Pressed further by Commission Counsel he testified:

"Q. Why is it a misnomer—wherein is it a misnomer to refer to basing points?

• • •

A. You will find that very much of the time from a mathematical standpoint, that the basing point and the freight added, and so forth, what I assume you had in mind, that wouldn't be the price at destination at all, and yet we meet the price at destination which considerable of the time is not the freight and the bags, and so forth, on top of the basing point.

• • •

Q. I am asking you to explain wherein it is a misnomer. A. Well, I say because the base means bottom, as I understand it, which is not the bottom price at all, and in that respect, if nothing else, it is a misnomer.

Q. As a matter of fact, the base point price is maximum price, isn't it? A. That is what it is.

Q. Yes. A. Absolutely. It is the maximum price.

Q. Oh, you think base price may be one thing and basing point another? A. It is the maximum price, but it is not the bottom price.

Q. Well, you are defining base as bottom. I asked you wherein the term 'basing point' was a misnomer, not what base or wherein 'base' was a misnomer or 'base price.' I asked you 'basing point.' A. I will be glad to make this explanation, which I think is one that I made before: if I was to apply a basing point in a way that I assume you have in mind, much of the time it wouldn't be the price that the Dewey Portland Cement sells cement for at that station, and, therefore, it is not a basing point, and at much

[13] (C) Tr. 14283-85.

of the time, as far as the Dewey Portland Cement Company is concerned."[14]

R. W. Moore, Vice President of Dewey, testified that "the lowest price at destination is the price that we adopt as our own price in quoting our customers, in order to meet the lowest price necessary[15] and that 'it makes no difference' whether the prices of competitors appear to reflect any mill base or do not appear to reflect any mill base".[16] Dewey's prices are "subject to variation wherever it is necessary to reduce them in order to meet competition".[17]

MONARCH:

Monarch has stated that it determines its delivered prices by "the combination of base price known plus the freight that makes the lowest delivered price per barrel at destination".[18]

Brooke, Vice President of Monarch, testified that Monarch has always had a so-called mill base at its plant, but it has only been "openly announced since probably 1930, maybe, somewhere around there, 1933". Asked to explain he testified as follows:

> "Well, our mill is about 9 miles from the Lehigh plant at Iola, Kansas. The Ash Grove plant is 9 miles south of us. The fact as to whether or not we have a mill base does not make very much difference."[19]

On cross examination he stated that the Monarch mill at Humboldt is a base mill and that he uses the Humboldt

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[14] (C) Tr. 14287-90.

[15] (R) Tr. 46931.

[16] (R) Tr. 46780.

[17] (R) Tr. 47207.

[18] Com. Ex. 3119 B: Answer to F.T.C. Questionnaire.

[19] (R) Tr. 42290.

base plus freight wherever it is lower than the Independence or Iola base plus freight.[20]

CONSOLIDATED. *(Fredonia mill)*:

There is no testimony respecting this mill. Fredonia was considered as a base mill by Burns and Clark for purposes of their questionnaire and as to this, the company said:

> "This mill is not a Base point mill but for the purpose of your questionnaire you have chosen to consider all the Gas Belt Mills at Base point mills. * * * Technically it is all right to do so as all rates to different territories are the same except to an 80-mile radius around each mill where actual mileage from such mill makes the rate. * * *
>
> Actually from this mill we meet competition that we find existing at delivery points and reduce our delivered prices to meet competition at such specific points." (Com. Ex. 971-19-V)

BIRMINGHAM, HUDSON RIVER, KANSAS CITY and ST. LOUIS.

At each of these locations are companies which have had the policy ordinarily of determining their respective prices by use of their own base plus freight to destination,[21] and the effective base figure initiated at these respective locations, is generally used commonly by the other mills in the group.[22]

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[20] (R) Tr. 42379-81.

[21] See fn. 2, pp. 410-411, *supra*.
Birmingham:)
and) Lehigh, Lone Star, Alpha and Universal Atlas.
Hudson River:)
Kansas City: Lone Star and Missouri.
St. Louis: Alpha and Missouri.

[22] See *e.g.* Resp. Ex. 457: List of basing points and basing prices used by Alpha, as revised 9/26/38.

OTHER AREAS:

The evidence as to the pricing of other companies which are located at or near a base mill, is, briefly, as follows:

AETNA:

Calvin, President of Aetna, asked how he determined his prices, testified that

> "Generally speaking, I arrive at a price by a combination of a mill price plus freight rate and then you are influenced by competitive conditions in a market, to try to find out what the price is, what competitors are quoting in a market; we try to be competitive." (Tr. 30017)

Cree, former Sales Manager of Aetna, asked about Aetna's pricing testified that he used basing points at other mills "only to the extent that it would better help me get a general analysis of the particular situation."[23] To the dealer trade it was his aim, in general to meet the delivered prices of other mills.

FEDERAL:

J. E. Bates, Sales Manager of Federal testified that the company determines its prices by finding out what the price is at destination and "we meet that price."[24] There are no arbitrary prices in Federal's sales area, everything is controlled by "a constant figure that is used in making up our price."[25] As he learns of prices in the field, they are checked back to "find out the pattern on which the price has been made; and then of course we meet that competition." The point from which prices appear to have been figured, he has always known as basing points.

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[23] (C) Tr. 513-14.

[24] (R) Tr. 30547.

[25] (R) Tr. 30811.

The base or basing point is nothing more than a figuring point.[26]

Bates testified further that he knew of no competitor that does not use the Buffalo base to establish his prices in the Buffalo area,[27] but all prices outside of Buffalo are not the Buffalo base plus freight; they run into some territories which are controlled by some other base. Federal must meet such prices if it wants to sell cement.[28]

PEERLESS:

Russell, Vice President and General Manager of Peerless, testified that "in general we follow prices made by competitors."[29]

Asked if he considered either of the Peerless mills a "basing point" he testified:

> "We consider that our Detroit mill is so close to a basing point, that there would be no object in our naming it a basing point * * * There is the Wyandotte plant of the Huron Cement Company within four miles of our Detroit plant."[30]

and that his Port Huron mill was not a basing point. He stated his view of the term "basing point" as follows:

> "That term means to me, that one must, as a practical means of putting a price on a commodity, place a price on that commodity at a particular time and at a particular location in order to have a place to start from in pricing. The commodity at that place, and at the time the price is placed on it, at that place, then has to move to points of use, and by placing a price at the time and at the place, you enable yourself to determine a price at the point of

[26] (R) Tr. 30551-52.

[27] (R) Tr. 30784.

[28] (R) Tr. 30777-78.

[29] (R) Tr. 34221.

[30] (R) Tr. 34344.

use, wherever that may be, after adding certain transportation costs.

The use of the words 'basing point' is just a convenient term to apply to that method of determining price."[31]

and added:

"It is not necessarily the method that we have used throughout the time that I have been with the company, although it has always been used in some of the territory into which we ship cement. * * *

All during the time that the so-called zone price basis was used in the lower peninsular, our principle volume of shipments could not be deemed as having been sold to the customer on any so-called basing point method.[32]

Trial Examiner Norwood: That is, within that zone area?

The Witness: Correct.

Trial Examiner Norwood: At the same time, you sold outside of that area?

The Witness: We sold a small proportion of our cement outside of the so-called zone area. I might state that that lower peninsula of Michigan accounted for something more than eighty-five per cent. of our shipments.

Trial Examiner Norwood: What was sold outside was sold at prices which related into your base or somebody else's base; is that right?

The Witness: They related to some other bases."[33]

On cross examination Russell testified as follows:

"Q. Do you attempt to make your delivered prices lower than your competitors? A. We attempt to sell at any particular point of use at the last known price at that point of use; if that can be construed as making it the same, we meet it.

[31] (R) Tr. 34345.

[32] (R) Tr. 34345-46.

[33] (R) Tr. 34356.

Q. In other words, the last known price of your competitor? A. Yes.

Q. At a given point. And, do you not find that our delivered prices and theirs, at many destinations, have been the equivalent of a price at some basing point plus freight to that particular destination? A. During the past several years in the area that we ship cement into, there have been several different methods of—apparently several different methods of determination of price at a destination.

Q. Yes, we have been over that. We had the blanket price in the lower peninsula of Michigan in 1937. Outside of that, haven't you found that destination prices are ordinarily the equivalent of some base price plus freight? A. Ordinarily, the destination prices are the sum total of a price at some particular point at which——

Q. Base point? A. (Continuing) —to which tariff—to which freight tariffs are added to determine the destination price.

Q. And those points you know are the basing points; do you not? A. I know that that word has been applied to the practice of starting a base price to which freight tariff should be added, yes.[34]

* * *

Trial Examiner Norwood: Can't you tell us how you figure out other prices in the same vicinity from prices you then picked up? Do you go back to the basing point and then apply freights to the points you haven't heard from; do you do that or not?

Mr. Wooden: He said he did.

The Witness: No, we do not do that way.

Mr. Wooden: Why, he said he did.

The Witness: We do not apply prices back to places we haven't heard from. We get information from every part of the territory.

By Mr. Wooden:

Q. Not from every destination in the territory? A. Not from every particular crossroad station.

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[34] (R) Tr. 34437-38.

Q. After you get the information from, say, every part of the territory, you then apply the pattern, do you not, to every destination in your territory? A. Unless there is some zone price established."[15]

There is no other testimony or evidence respecting the pricing of Green Bag, Pa. which has a mill at Neville Island in Pittsburgh or Trinity's mills at Eagle's Ford and Houston, Texas. Storey, Vice President of Trinity testified that his price policy was to offer cement at destination at a price and on terms and conditions that are as favorable as other cements at the same place and time (Tr. 47586).

c. Non Base Mills

Many companies characterized their pricing policy as one of meeting prices as they find them in the markets where they sell,[1] although a number of them have on occa-

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[15] (R) Tr. 34442-43.

[1] Arkansas: Thompson, Sales Manager (R) Tr. 46484-85, 46617-19.
Bessemer: Warren, F. B., Vice President (R) Tr. 32526, 32530.
Castalia: Com. Ex. 3121 E.
Cumberland: Pearson, Secretary-Treasurer (R) Tr. 39851.
Diamond: Com. Ex. 3139 C.
Georgia: Com. Ex. 3116 B.
Glens Falls: Titsworth, President (R) Tr. 47891-93.
Green Bag, W. Va.: Wood, General Manager (R) Tr. 29407.
Hawkeye: Com. Ex. 3142 C-D; Manley, General Manager (R) Tr. 41615.
Hermitage: McGovern, Sales Manager (R) Tr. 36125, 36342-43.
National: Dannelly, Vice President (R) Tr. 39628, 39629-30.
North American: Porter, President (R) Tr. 33792, 33794, 33806, 33814.
Oklahoma: Thompson, Sales Manager (R) Tr. 46484-85, 46617-19.
Petoskey: Lucas, Vice President (R) Tr. 38747-48.
Pittsburgh: Letzkus, Sales Manager (R) Tr. 37694.
Southwestern: Warren, G. E., Vice President (R) Tr. 28762, 28769.

sion initiated changes in prices.[2] They have not established bases at their mill, nor are they located so close to some base mills as to have common rates to a substantial number of destinations. Most of these companies have stated that where they find base prices used by surrounding mills they reflect the lowest combination of such base prices plus the freight to destination in anticipating or determining their own respective delivered prices.[3] The evi-

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Southern States: Elcock, Vice President (R) Tr. 37502.
Standard: Adopted (R) Tr. 38703, 38742-44.
Superior: Davis, President (R) Tr. 29590-91.
Volunteer: Parsons, Sales Manager (C) Tr. 5008-09, 5032-33, 5208; Hanahan, President (R) Tr. 38633; Roberts, Traffic Manager (R) Tr. 31713.
Wabash: Com. Ex. 3148 C.
West Penn: McKee, Vice President (R) Tr. 27695-97.
Wolverine: Nelson, J. L., Vice President (R) Tr. 35905-06.

[2] See p. 254, *supra*.

[3] Bessemer: Warren, F. B., Vice President (R) Tr. 28769, 32335-36, 32528-31.
Cumberland: Pearson, Secretary-Treasurer (R) Tr. 39854-55.
Diamond: Com. Ex. 3139 E.
Georgia: Com. Ex. 3116 B.
Glens Falls: Titsworth, President (R) Tr. 47918-20.
Hawkeye: Manley, General Manager (R) Tr. 41615.
Hermitage: McGovern, Sales Manager (R) Tr. 36337-38, 36343-44.
National: Dannelly, Vice President (R) Tr. 39747, 39713, 39723.
North American: Porter, President (R) Tr. 33806-07.
Petoskey: Lucas, Vice President (R) Tr. 38746-47, 38795.
Pittsburgh: Letzkus, Sales Manager (R) Tr. 37692.
Southwestern (Osborn): Warren, G. E., Vice President (R) Tr. 28800.
Southern States: Elcock, *supra*, Tr. 37604, 37608, 37623-24.
Superior: Davis, *supra*, Tr. 29622.
Volunteer: Roberts, *supra*, Tr. 31989.
Wabash: Com. Ex. 3148 C.
West Penn: McKee, *supra*, Tr. 27863-64.
Wolverine: Nelson, J. L., *supra*, Tr. 35905-06.

dence as to the practice of these companies in meeting prices is substantially the same as is shown by a few samples set out below.

Cumberland, Diamond, North American, Petoskey and West Penn showed substantially the same policy in answer to the Federal Trade Commission questionnaire in 1930.[4] This inquired, among other things, how each company determined its delivered prices on "sealed bids or when meeting competition." The answers of Diamond and Cumberland are typical. Diamond discussed its pricing at length and on the point in question said:

> "* * * Our method of arriving at a quotation for any destination point is to ascertain the prevailing price at that point and to quote the same price. It is manifestly impossible in marketing a standard commodity, such as portland cement, to obtain a price higher than the prevailing price in any given market. In any case where a manufacturer quoted a price under the market, this price might be met by his competitors which would have the effect of reducing the base price, and thus mean a general reduction of prices throughout the territory affected."[5]

Cumberland answered the same question as follows:

> "When submitting delivered prices on cement by sealed bids, or otherwise, at any given destination we always quote on a basis equal to the lowest price per barrel last known by us to have been offered by one of our competitors at that destination and upon

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[4] Cumberland: Com. Ex. 3132 D.
Diamond: Com. Ex. 3139 E.
North American: Com. Ex. 3124 D.
Petoskey: Com. Ex. 3123 D.
West Penn: Com. Ex. 3134 C.

[5] Com. Ex. 3139 C.

> the terms and conditions of sale as in effect with us at time of bidding.'"[6]

Green Bag of West Virginia and Superior did not answer the questionnaire, but the testimony on their behalf was to the same general effect. Wood, General Manager of Green Bag, testified that the company tries "to meet competition, when we find it."[7] Davis, President of Superior, testified that his delivered prices were determined:

> "* * * by our best guess based on the information we receive from the salesmen in the territory as to what the market will stand * * * We at times have gone a little lower than our competitors at a given destination; but ordinarily, we attempt to meet * * * the lowest price that we find in the field."[8]

Hawkeye, Pittsburgh, Standard, Wabash and Bessemer submitted substantially similar answers to the F.T.C. questionnaire.[9] Typical was that of Pittsburgh:

> "Our selling price is determined by the competition we have to meet and these competitive prices are ascertained by our salesmen in the field who pick up quotations sent out by competitors and sometimes see invoices * * *." (Com. Ex. 3133 G)

Representatives of Hawkeye, Pittsburgh and Bessemer

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[6] Com. Ex. 3132 D.

[7] (R) Tr. 29407.

[8] (R) Tr. 29590-91.

[9] Bessemer: Com. Ex. 3168 C.
Hawkeye: Com. Ex. 3142 C-D.
Pittsburgh: Com. Ex. 3133 G.
Standard: Com. Ex. 3169 D-E.
Wabash: Com. Ex. 3148 C.

testified to the same effect.[10] There was no other evidence on the point respecting Wabash or Standard.

Titsworth, President of Glens Falls, testified that "through salesmen and old customer accounts, we try to learn the lowest destination price which we have to meet" and "we meet it or not as we see fit."[11]

McGovern, Hermitage Sales Manager testified that they meet "the lowest prices that our salesmen find at delivered points" and that he has no interest in the manner in which he finds these prices made up.[12]

Elcock, Vice President of Southern States, testified that as a "price follower" "I normally find prices out in the field, and I meet that price".[13] Asked how he determines the competition he has to meet he said:

> "Everybody in a given town acquainted with the industry at all knows what the competition is there. Everybody knows the price of cement at any point".[14]

Roberts, Traffic Manager of Volunteer, testified that the company is a price follower and determines competitors' prices "through quotations which we pick up and from information" received from salesmen and customers.[15]

J. L. Nelson, Vice President of Wolverine, said the company is a price follower which meets the lowest delivered prices quoted in any market where it wishes to sell.[16]

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[10] Manley, General Manager, Hawkeye (R) Tr. 41615-17.
Letzkus, Sales Manager, Pittsburgh (R) Tr. 37691-94.
Warren, F. B., Vice President, Bessemer (R) Tr. 32333-35.

[11] (R) Tr. 47890-91.

[12] (R) Tr. 36125, 36135.

[13] (R) Tr. 37502.

[14] (R) Tr. 37503-04.

[15] (R) Tr. 31713.

[16] (R) Tr. 35905.

The evidence as to the price policy of Idaho, Utah, Colorado and Union on this point is not clear.

Colorado and Union stated in response to the Questionnaire that all their assets were owned and their plants operated by Ideal Cement Company and, asked how they determined prices on sealed bids or when meeting other competition, stated "Don't Apply".[17]

Responding to the F.T.C. Questionnaire as to the method of determining its delivered prices on "sealed bids" or when "meeting other competition" Idaho said:

> "We use the price the competing mills secured business with on previous bids and either meet it or bid a little under. Owing to just entering this territory, we have lost some business by not being able to figure just what competing mills bid on some jobs."[18]

Utah responded to the F.T.C. Questionnaire as follows:

> "No standard method used.
>
> Bids are governed by competitive territory in which cement is delivered and transportation rates."[19]

The manner in which basing points are used by the so-called price followers is illustrated by excerpts from the evidence below.

Lucas, Vice President of Petoskey, after noting the existence of a flat price in Michigan[20] testified as follows:

> "* * * At other times the delivered prices appear to form a pattern around some mill, or other shipping point, the delivered prices varying in accordance with the amount of the freight rate from that mill to the various destinations. We then carefully check to ascertain whether or not there is a uniform

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[17] Com. Ex. 3176 R, LL.

[18] Com. Ex. 3171 C.

[19] Com. Ex. 3137 C.

[20] See Section E, p. 590, *infra*.

net at this company's mill or silo for any given territory, and if there is we assume, until we find delivered prices reflecting some other condition, that the competitor intends to limit himself to that net—sometimes called a base or price base or so-called base price—on all of his business.

With that information as to the mill net or base, we attempt to anticipate the delivered prices which that company will quote at other points and we issue quotations either meeting the change or restating our own prices.

Upon issuing quotations to points at which we have no specific information as to what prices are quoted, we have no assurance that our price will meet the prices quoted by the company initiating the price change. We are sure, however, that if our quotations were higher than our competitors, our dealers would inform us, and if our quotations were lower than any of our competitors they would be forced to meet our low quotations. In addition, if our quotations were lower or higher, our salesmen would probably be advised of this fact on their calling upon the trade.[21]

• • •

In arriving at its delivered prices for the various destinations where it sells cement, Petoskey recognizes that the market price at many points usually reflects some base or basing point. Petoskey, however, quotes the lowest quoted price at each point where it sells cement regardless of whether or not the delivered price appears to reflect a base."[22]

On cross examination, Lucas testified:

"Q. Don't you assume, as you state in your stipulated testimony, that you can apply the mill net that figures back to a consistent figure at a given mill in applying that to other destinations? A. We have.

Q. You act upon the assumption that that will

[21] (R) Tr. 38746-47.

[22] (R) Tr. 38748.

make the price at the other destinations, don't you? A. That is right, at times.

Q. Do you mean to say that, after taking out these cases that you have described, that you cannot depend upon the price at given destinations being the equivalent of the base price plus freight? A. Well, I say this, Mr. Wooden, that if we were quoting on a substantial quantity of cement I would not depend upon that, no, in its entirety.

Q. In its entirety; how about carload business in general? A. We frequently make quotations on the carload, yes.

Q. In that way? A. On that basis.

Q. And particularly in your business with dealers; isn't that true? A. Yes.

Q. Taking your dealer business by itself, don't you find or haven't you found that ordinarily the delivered price to dealers at given destinations was the equivalent of some base point price plus freight? A. Frequently.

Q. I asked you whether ordinarily it is. A. Well, the term 'ordinarily', I do not know just what you mean, Mr. Wooden, how broad that might be. I will say quite frequently, yes, that is true.'"[22]

McGovern, Sales Manager of Hermitage, testified as to the use of basing points by his company as follows:

"Trial Examiner Norwood: Do you do any pricing which you figure out yourselves?

The Witness: Yes, sir.

Trial Examiner Norwood: You are not governed by what you find in the field?

The Witness: A lot of times, after you find a certain number in the field, you will find a point in highway jobs, maybe, where it is necessary to do some pricing without a quotation picked up at that point.

By Mr. Werle:

Q. With respect to that, how would you go about that? A. Just as I say, after you have a certain

[22] (R) Tr. 38795-96.

number of quotations in any area, and figure them back to a common point, you know what that price at that mill is. Consequently, if you have occasion to figure a price at some point, where you do not have a card, you figure that delivered price on the basis of that area.

Q. You say you know what the price at that mill is. How do you know that is the price? A. You just use your own judgment. Of course, you cannot be positive that that is what it is going to be, from past experience.

Q. Have you had any occasions where you used your judgment, as you expressed it, and have been wrong? A. Yes, sir.'"[24]

Later, respecting the same subject:

"• • • those bids, as a general rule, are commercial prices delivered at that point, and we naturally know what our prices are at that point.

Q. Is that the whole story? A. Yes, I would say so.

Q. What if you bid at a point where there were no commercial prices—you have done that, have you? A. I am satisfied we have, yes.

Q. And you have had identical bids at that point? A. I am satisfied we have.

Q. How do you explain that? A. That goes back to after you find a common point, a common mill price, and have no dealers where you could pick up a commercial price at that point, why, we use the mill price plus the lowest point that will make the price to that point; of course, being in line with the other prices in that vicinity.

Q. Well, now, you do that in all of your bidding, —in all of your quotations, do you not? I mean, you do that—I mean, you apply that formula method of arriving at destination prices? A. That is, if we don't find a different price at destination?

Q. Yes. A. Of course, what we do is meet the

[24] (R) Tr. 36164-65.

price at destination regardless of how it is made up.[25]

• • •

Q. Besides dealer information and salesmen information, what else do you have to tell you, or guide you in quoting destination prices? You already mentioned figuring back to base. I am trying to get you to tell us in your words how you understand that to work. A. Well, of course, as I told you a while ago, if we do not have a price; that is, at a point, no dealer there, or a destination price, what we, of course do, is to figure back to the lowest mill price plus the freight."[26]

Manley, General Manager of Hawkeye testified as follows:

"The Hawkeye Company takes the quotations which it finds and endeavors to figure them back to the various mills in order to simplify the process of gathering information. Immediately, upon learning of a price change at any point in its sales area, the Hawkeye Company gets in touch with its salesmen and as many of its dealers as possible to ascertain how large a part of its territory is affected by the price change. The Hawkeye Company deducts the freight rates applicable from various mills, and repeats that process in order to determine whether a particular mill base is being used. It checks quotations at a considerable number of points, and if it discovers that they relate constantly to a certain mill, it assumes that that mill is a so-called basing mill.[27]

• • •

When the Hawkeye Company is satisfied that there has been a price change in its marketing territory, it does not check competitive prices at every destination in the immediate area before sending out

[25] (R) Tr. 36337-38.

[26] (R) Tr. 36343-44.

[27] (R) Tr. 41615-16.

its own quotations. It takes the new prices which it has learned of and by deducting the freight from all mills in its marketing territory to the destinations reflect a mill base at some producing mill."[28]

Dannelly, Vice President of National, was cross examined by Commission Counsel thus:

"Q. Calling your attention to Respondents' Exhibit 3042 X, will you tell us what is referred to in the use of the term 'base point sheets'? A. At one time we sent our salesmen from time to time a list of points that we considered were points that influenced prices at specific times.[29]

* * *

Q. Well, for what purpose did you expect them to use such information? A. They could use that to estimate prices, but we never let a salesman quote a price when he was working for our company.

Q. He could calculate your delivered prices, though, through that method? A. It was possible to do so.

Q. And you furnished him the tools with which he could do so. A. For a while we did; yes.

Q. Why is it necessary, Mr. Dannelly, for either you or any one of your salesmen to know anything at all about basing-point prices? A. Well, it is not. We could struggle along and sell our cement without knowing anything about a basing point. We couldn't do it as efficiently, and probably could not sell as much cement, and might not be able to sell so much, but we could sell cement, and plenty of it, if we did not know anything about basing-point prices.

Q. When you say you could not do it as efficiently—— A. I should not have made that remark. I will change it. We could sell our cement if there was not such a thing as a base price.

Q. Did you not mean when you said 'not as efficiently,' that you could not match the prices of your competitors at all destinations as easily as you do

[28] (R) Tr. 41616-17.

[29] (R) Tr. 39745.

now? A. No, sir; no, sir. I meant by that—I started to mean, without as much confusion among the salesmen, as to changing their vernacular, as to our basing points.

Q. To drop all your work on basing points, would throw your salesmen into some confusion, would it not? A. Yes; any change in your practice would cause some confusion.

Q. I believe on direct examination you testified to the method of such figuring and compilation prompted you to anticipate the price of your competitors at various destinations. That is correct, is it not? A. We use those methods in anticipating them."[30]

d. Analysis of Prices

The Commission found:

"* * * When a corporate respondent makes a change in its base price, written delivered-price quotations reflecting this change are usually sent to all customers. Through common customers and through salesmen in the field, information concerning this change reaches the other respondents selling cement in that area almost immediately. Examination of a reasonable number of the new price quotations reveals the pattern followed and thus discloses the base price change made."[31]

In view of this finding there is omitted from this digest the great body of evidence on behalf of respondents showing the manner in which, by deduction of freight charges from delivered price quotations, they are able to discover the extent and nature of changes in prices,[2] whether or not the

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[30] (R) Tr. 39746-47.

[31] Fdgs., Par. 9(e).

[2] Aetna: Calvin, President (R) Tr. 30344-45.
Alpha: Coogan, Vice President (R) Tr. 23058-59.
Postelle, Sales Manager (R) Tr. 25424.
Cumberland: Pearson, Secretary-Treasurer (R) Tr. 39854-55.
Federal: Bates, J. E., Sales Manager (R) Tr. 30811, 30551.

prices found have any pattern,[3] whether or not a base has

Glens Falls: Titsworth, President (R) Tr. 47917, 47919-20.
Green Bag, W. Va.: Wood, General Manager (R) Tr. 29514.
Hawkeye: Manley, General Manager (R) Tr. 41615-16.
Hercules: Brobston, President (R) Tr. 26083.
Kosmos: Horner, President (R) Tr. 36810.
Lone Star: Neylan, Asst. General Sales Manager (C) Tr. 6324-25.
Medusa: Dawson, Vice President (R) Tr. 40046-47, 40515-16.
Missouri: Alexander, President (R) Tr. 37119-20.
Monarch: Brooke, Vice President (R) Tr. 42377-78.
National: Dannelly, Vice President (R) Tr. 39619-21.
Nazareth: Robeson, Vice President (R) Tr. 28006, 28012-13.
Petoskey: Lucas, Vice President (R) Tr. 38745-46.
Southwestern (Osborn): Warren, G. E., Vice President (R) Tr. 28763.
(El Paso): Blair, W. R., Sales Manager (R) Tr. 38945-47.
Volunteer: Roberts, Traffic Manager (R) Tr. 31923-24.

[3] Alpha: Coogan, Vice President (R) Tr. 23058-59.
Consolidated: Storey, President (R) Tr. 47617-18.
Federal: Bates, J. E., Sales Manager (R) Tr. 30551-52, 30784, 30811-12.
Florida: Storey, Vice President (R) Tr. 47617-18.
Green Bag, W. Va.: Wood, *supra*, Tr. 29514.
Kosmos: Horner, *supra*, Tr. 36810.
Medusa: Dawson, *supra*, Tr. 40047-48.
Nazareth: Robeson, *supra*, Tr. 28173.
Peerless: Russell, Vice President (R) Tr. 34337.
Signal Mountain: Storey, Vice President (R) Tr. 47617-18.
Southwestern (Osborn): Warren, G. E., *supra*, Tr. 28763, 28811.
Trinity: Storey, Vice President (R) Tr. 47617-18.
Volunteer: Roberts, *supra*, Tr. 31716-17.
Wolverine: Nelson, J. L., Vice President (R) Tr. 35903.

been used,[4] and if so, what the base price is.[5] When this

[4] Aetna: Calvin, President (R) Tr. 30048, 30344-45.
Alpha: Fellows, Sales Manager (R) Tr. 25836-37.
Bessemer: Warren, F. B., Vice President (R) Tr. 32531-36.
Dankel, Sales Manager (C) Tr. 11349-50.
Castalia: Com. Ex. 3121 E.
Consolidated: Storey, President (R) Tr. 47617-18.
Cumberland: Pearson, Secretary-Treasurer (R) Tr. 39854-55.
Dewey: Bass, Attorney-Examiner, F.T.C. (C) Tr. 13456 (reporting Tyler); Tyler, President (C) Tr. 14283-84.
Florida: Storey, Vice President (R) Tr. 47617-18.
Glens Falls: Titsworth, President (R) Tr. 47919.
Hawkeye: Manley, General Manager (R) Tr. 41616.
Hercules: Brobston, President (R) Tr. 26083.
Hermitage: McGovern, Sales Manager (R) Tr. 36165.
Kosmos: Horner, President (R) Tr. 36810.
Lawrence: Ackerman, Vice President (R) Tr. 31253-59.
Louisville: Hill, Vice President (C) Tr. 13273.
Medusa: Dawson, Vice President (R) Tr. 40047.
Missouri: Alexander, President (R) Tr. 37120.
Monarch: Brooke, Vice President (R) Tr. 42191-92.
Nazareth: Robeson, Vice President (R) Tr. 28013, 28173.
North American: Harte, Vice President (C) Tr. 7512-13.
Porter, President (R) Tr. 33806-07.
Northwestern States: MacDonald, B. A., Vice President (R) Tr. 36482.
Penn-Dixie: Browder, Traffic Manager (R) Tr. 38143.
Petoskey: Lucas, Vice President (R) Tr. 38746.
Pittsburgh: Letzkus, Sales Manager (R) Tr. 37692.
Signal Mountain: Storey, Vice President (R) Tr. 47617-18.
Southern States: Elcock, Vice President (R) Tr. 37614.
Com. Ex. 3160 B.
Southwestern (Osborn): Warren, G. E., Vice President (R) Tr. 28763-65.
Trinity: Storey, Vice President (R) Tr. 47617-18.
Universal Atlas: Stone, Vice President (C) Tr. 484-91.
Volunteer: Parsons, Sales Manager (C) Tr. 5126.
Roberts, Traffic Manager (R) Tr. 3172.

[5] Aetna: Calvin, *supra*, Tr. 30048.
Alpha: Fellows, *supra*, Tr. 25836-37.
Ash Grove: Sunderland, President (C) Tr. 13596.
Castalia: Com. Ex. 3121 E.

analysis shows a repeated figure at a shipping point for cement, it is ordinarily assumed to indicate the use of a base at that point. This was explained by Pearson, Secretary-Treasurer of Cumberland, as follows:

> "When Cumberland is advised by its salesmen or customers that a competitor has advanced its prices at a particular destination, the company's practice is immediately to check with its salesmen and customers at all the principal destinations in its sales area to find out whether or not the advance in price by the competitor is general or whether it is confined merely to a particular destination or a particular area. Cumberland may or may not meet the advance, depending upon what it finds that other competitors do within the immediately succeeding days. Having discovered that the advances in prices do affect a particular area, Cumberland attempts to dis-

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Dewey: Bass, Attorney-Examiner, F.T.C. (C) Tr. 13456 (reporting Tyler).
Capen, Vice President (C) Tr. 12666-68.
Tyler, President (C) Tr. 14283-84.
Glens Falls: Titsworth, President (R) Tr. 47919.
Hercules: Brobston, President (R) Tr. 26083.
Hermitage: McGovern, Sales Manager (R) Tr. 36165.
Lawrence: Ackerman, Vice President (R) Tr. 31258-59.
Louisville: Hill, Vice President (C) Tr. 13273-74.
Medusa: Dawson, Vice President (R) Tr. 40047.
Missouri: Alexander, President (R) Tr. 37120.
Monarch: Brooke, Vice President (R) Tr. 42191.
North American: Harte, Vice President (C) Tr. 7541-42.
Penn-Dixie: Browder, Traffic Manager (R) Tr. 38143-44.
Wing, Vice President (C) Tr. 8084-85.
Petoskey: Lucas, Vice President (R) Tr. 38746.
Southern States: Elcock, Vice President (R) Tr. 37614. Com. Ex. 3160 B.
Southwestern (Osborn): Warren, G. E., Vice President (R) Tr. 28764-65.
(El Paso): Blair, W. R., Sales Manager (R) Tr. 38947.
Universal: Cropkrite, Vice President (C) Tr. 13529.
Volunteer: Parsons, Sales Manager (C) Tr. 5129.
West Penn: McKee, Vice President (R) Tr. 27695-97.

cover the nature of the price change. In order to do that, it deducts from the delivered prices, so found, the freight rates applicable from the various mills shipping to each destination in order to determine whether or not the new prices reflect some constant figure at a given mill. If Cumberland finds that a constant figure is reflected, it then assumes, on the basis of what has happened in the past, that the other prices quoted by the given company in that area which have not yet come to its attention will be made on the same basis as the prices found. Accordingly, if Cumberland should have occasion to quote at such points it would anticipate that condition in an attempt to be competitive.

If Cumberland is advised by its customers and salesmen that the price of a competitor at a given point has been reduced, it immediately meets the reduction, but at the same time checks again throughout the area to find out what is the extent and nature of the reduction in order that it may attempt to anticipate the lowest prices a competitor will quote at other points.

This attempt to anticipate the lowest prices which might be quoted by others is not done through or by reason of any understanding, agreement, or arrangement with any other Respondent. It is based simply on past experience coupled with a desire to attempt to meet competitive conditions in all Cumberland's markets as rapidly and speedily as possible so that the company will have an opportunity at least as favorable as any other competitor of obtaining business from its alert customer trade at any point where it sells. The Cumberland Company is dealing with hundreds of customers at hundreds of destinations and almost all of such customers are dealing with or being solicited by from one to ten or fifteen competitors. Speed and alertness on Cumberland's part to meet any and all competitive conditions, even if it is necessary to guess at or anticipate them, is an absolute essential to stay in the market and keep its customers." (Tr. 39854-56)

Alexander, President of Missouri, testified on the point thus:

> "Immediately upon learning of a price change at any point in its marketing area, the company gets in touch with its salesmen and as many of its dealer customers as it can in order to ascertain how extensive the price change is.
>
> The Missouri Portland Cement Company takes the new prices which it learns of and deducts the freight rates from all mills competing in its marketing territory to the destinations involved in order to determine whether they reflect a mill base at some producing mill. When the company has satisfied itself that there has been a price change in any part of its marketing territory, it does not check competitive prices at every destination in the area before sending out its own quotations. Having satisfied itself as to the nature of the change, if the new prices are lower than prices it has been quoting, it meets them immediately or foregoes the business. If the new prices are higher, it decides whether or not it will follow them and acts accordingly." (Tr. 37119-20)

Coogan, Vice President of Alpha, testified:

> "Now, we—when we find these changes and we get enough of them which indicate how the figure has been arrived at, then we immediately, as soon as possible after that, send out our quotations usually on the same basis as the then destination price being made by our competitors." (Tr. 23058-59)

Horner, President of Kosmos, testified:

> "Upon receiving the first information about either a new quotation above or below the market, we advise our salesmen to check all the delivered prices quoted at the various destination points in their territory. Our salesmen check the prices quoted by each of our competitors in an attempt to confirm either the old price or to ascertain what changes have been made at all of the important

points where Kosmos cement is consumed, and we always contact the dealers who consume large amounts of our cement. This information is then telephoned and forwarded to the home office where we take the various quotations we have received, and we compare the delivered prices which have been quoted.

During the time that I have been with the Kosmos Company the comparison of the delivered prices has, on several instances, shown that a flat price was quoted at most of the points in some territory such as Hamilton County, or the State of Ohio, and we assumed that this price existed for the entire areas, until we found information to the contrary. At other times the delivered prices appear to form a pattern from some mill, the delivered prices varying in accordance with the amount of the freight rate from that mill to the various destinations. We then carefully check to ascertain whether or not there is a uniform net at this company's mill or silo, and if there is we assume that the competitor intends to limit himself to that net—sometimes called a base or price base or so-called base price—on all of his business.

With that information as to the mill net or base, we attempt to anticipate the delivered prices which that company will quote at other points, and we assume that we have met his competition unless we hear to the contrary from our dealers.

With this information as to the delivered prices, we issue quotations either meeting the change or restating our own prices.

Upon issuing quotations to points at which we have no specific information as to what prices are quoted, we have no assurance that our price will meet the prices quoted by the company initiating the price change. As soon as we have issued the quotations, unless we hear to the contrary from our dealers, we are sure that if our quotations were higher than our competitors, our dealers would inform us, and if our quotations were lower than our competitors they would be forced to meet our new low quotations. In addition, if our quotations were

lower, our salesman would probably be advised of this fact on his calling upon the trade." (Tr. 36809-11)

Bowen, Vice President of Lehigh, explained what that company does with an illustration:

"Let me say, for example, our Pittsburgh office should find quotations in the field from the Universal Atlas Company at Pittsburgh. Well, our Pittsburgh office would develop that information from its salesmen from early in the morning in which those quotations are in the field. The Pittsburgh office would hear from its six or eight salesmen who in the territory would be affected by the change or the report from each of those six or eight salesmen might represent contacts that the salesmen had made with perhaps six dealers. He reports that information to Pittsburgh. Pittsburgh gets its conception of the situation and reports it to us at Allentown. Now, that same change in price may perhaps affect portions of the territory covered by our Buffalo office. By the time we hear from the Pittsburgh man we probably have also heard from the Buffalo man. Now, our judgment of those situations is a composite of all the information these men have collected, and our action also takes into consideration the general reliability of the man that is reporting it, where we have our own ideas as to the degree of accuracy or dependability of the information received from the various members of our organization, and when, in our judgment, that information shows a picture, then we decide what we are going to do.

Q. In other words, there is no set—— A. No. It is a matter of the facts and our judgment on those facts." (Tr. 27188-89)

Lucas, Vice President of Petoskey, testified that after finding a uniform net at a competitor's mill:

"• • • we assume, until we find delivered prices reflecting some other condition, that the competitor

intends to limit himself to that net—sometimes called a base or price base or so-called base price—on all of his business.

With that information as to the mill net or base, we attempt to anticipate the delivered prices which that company will quote at other points and we issue quotations either meeting the change or restating our own prices.

Upon issuing quotations to points at which we have no specific information as to what prices are quoted, we have no assurance that our price will meet the prices quoted by the company initiating the price change. We are sure, however, that if our quotations were higher than our competitors, our dealers would inform us, and if our quotations were lower than any of our competitors they would be forced to meet our low quotations. In addition, if our quotations were lower or higher, our salesmen would probably be advised of this fact on their calling upon the trade." (Tr. 38746-47)

In connection with a Michigan price change which affected points inside Michigan and points outside differently, Stone, Vice President of Universal Atlas, was cross-examined as follows:

"Q. You mean to say that you had field information as to all the destinations just inside Michigan and all those just outside Michigan so that you knew that was constant at every destination, those distances? A. I think, Mr. Wooden, that requires a little explanation.

Q. That is what I thought. A. In no case, or in almost no case do we, at the immediate time of a price change, find competitors' quotations at every destination. We find enough of them to give us the pretty firm belief that such and such a situation exists, and then right after the change has been made, in our day-to-day business, in the contacts of our salesmen with the trade, we confirm that information or that belief of ours more and more each day as it passes.

Q. Well, in this particular case, you may have been acting, then, on that assumption or that faith without knowing that every town outside of Michigan showed the $1.65 Alpena base? A. It is possible at the immediate time of the price change, but within a very short time thereafter our belief is being confirmed more and more in each day in our contacts with the trade until we are finally, and when I say 'finally' I mean within a comparatively short period, practically convinced that those are the quotations that our competitors make.

Q. But you make your changes before you are ultimately and finally convinced and have information as to all those points? A. We do * * *." (Tr. 35281-82)

Robeson, Vice President of Nazareth, on cross examination, testified:

"Q. Didn't I understand you to say yesterday that you found prices in the field, took them back to some base-point figure, issued quotations in that territory by adding that figure, and freight rates together, the freight rates it took from the Freight Rate Institute Book? A. That is not exactly my words. We find the quotations in the field, and we check them, and if they relate back to a constant figure at a figuring point, then as long as we have that information, that is the last information we have from the field, we feel that we are reasonable in using the last information we have that our price will be as low as the lowest. We are not sure it will be.

Trial Examiner Norwood: Now, in quoting other points from the one where you pick up the price, would you use that constant figure, then, plus freight, in quoting other points in that territory?

The Witness: Well, your Honor, when you pick up these quotations you pick them up over a wide area.

Trial Examiner Norwood: Yes.

The Witness: In other words, most of the territory we operate in is a concentrated active shipping, repeat shipments.

Trial Examiner Norwood: Then, you have never quoted at a point where you have not actually picked up the competing price?

The Witness: Oh, yes, sir; we do. We do on occasion: yes, sir.

Trial Examiner Norwood: Now, when you do that you use this constant figure that you have arrived at by deducting the freight from other points in that territory to figure the price, the particular price?

The Witness: That would be one way of doing it. The other way, as I explained the other day, you have got particular isolated points, you pick up—you might have that surrounded on the same rail by two other towns.

Trial Examiner Norwood: That is the common freight rate?

The Witness: Common freight rate.

Trial Examiner Norwood: And that would be assuming that that is the same figuring price obtaining in the similar locality?

The Witness: Yes. In other words, you have no assurance that it would, but you anticipate your price would be as low as the lowest.

Trial Examiner Norwood: Assuming that it did.

The Witness: That is right.

By Mr. Paulson:

Q. That is, adding the rate in the Freight Rate Institute book to that figure gives you the destination price? A. On the last known information you had, I would assume my price or anticipate my price would be as low as the lowest at that point. I have no assurance of it." (Tr. 28423-25)

The evidence of the other witnesses referred to in footnotes 2-5, *supra*, pp. 456-459 was of the same character as the examples just given.

Executives of respondents testified that when they assumed the use of a base from analyzing prices as described, they had no assurance that their prices will be as low as the lowest.[6]

Executives of nine respondents testified that there had been numerous instances where, having anticipated or assumed the lowest price at a given point, they were advised by customers that they had guessed wrong and quoted

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[6] Alpha: Coogan, Vice President (R) Tr. 23170, 23060, 23206-07.
Bessemer: Warren, F. B., Vice President (R) Tr. 28769, 32335-36, 32356.
Consolidated: Storey, President (R) Tr. 47617-18.
Cumberland: Pearson, Secretary-Treasurer (R) Tr. 39852-56, 39859.
Edison: Sweeney, Vice President (R) Tr. 35650, 35661-63.
Federal: Bates, J. E., Sales Manager (R) Tr. 30840, 30579.
Florida: Storey, Vice President (R) Tr. 47617-18.
Green Bag (W. Va.): Wood, General Manager (R) Tr. 29517.
Hawkeye: Manley, General Manager (R) Tr. 41617.
Hermitage: McGovern, Sales Manager (R) Tr. 36165, 36359.
Keystone: Scott, H. M., President (R) Tr. 27518.
Kosmos: Horner, President (R) Tr. 36811.
Medusa: Dawson, Vice President (R) Tr. 40048-49.
Missouri: Alexander, President (R) Tr. 37122.
National: Dannelly, Vice President (R) Tr. 39799.
Nazareth: Robeson, Vice President (R) Tr. 28025, 28373, 28382-83, 28424-25.
Northwestern States: MacDonald, B. A., Vice President (R) Tr. 36482.
Penn-Dixie: Browder, Traffic Manager (R) Tr. 38144.
Petoskey: Lucas, Vice President (R) Tr. 38747, 38794-95, 38797.
Pittsburgh: Letzkus, Sales Manager (R) Tr. 37692-93, 37992.
Signal Mountain: Storey, Vice President (R) Tr. 47617-18.
Southern States: Elcock, Vice President (R) Tr. 37651.
Trinity: Storey, Vice President (R) Tr. 47617-18.
Universal Atlas: Stone, Vice President (R) Tr. 35288-89.
West Penn: McKee, Vice President (R) Tr. 27705-06, 27885, 27940.

higher or lower than the prices they intended to meet.[7] Thus Alpha produced a series of correspondence with dealers calling its attention to the fact that its prices were higher than competitors, and showing that cement already shipped was re-invoiced at the lower price in each instance on demand of the customer.[8] Characteristic is the letter to Alpha from Clark Hardware & Provision Co. of Wilson, N. C. on April 11, 1927:

> "We wired you a day letter to-day in regards to a price of $2.69 less regular discounts on cement. We have received your answer to this wire stating that you would meet this price for immediate acceptance. We do not understand why it should be an immediate acceptance proposition, as we received on April 7th from five Portland cement corporations a price of $2.69 less regular discounts, as a new price effective April 7th, shipment within fifteen days from date of order.
>
> Today we received your quotation of $3.01 less 25¢ and regular discounts, which is considerably higher than the other companies, we do not understand this.
>
> On last Thursday, April 7th, we quoted based on your price a certain contractor in this city, a price

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[7] Aetna: Calvin, President (R) Tr. 30353.
Resp. Ex. 3010 N-O.
Alpha: Coogan, Vice President (R) Tr. 23170, 23315-16, 23320-21.
Resp. Exs. 511-518.
Bessemer: Warren, F. B., Vice President (R) Tr. 32336, 32354.
Edison: Sweeney, Vice President (R) Tr. 35650, 35661-63.
Resp. Ex. 2553.
Hermitage: McGovern, Sales Manager (R) Tr. 36165-66.
Medusa: Resp. Ex. 3146 for id.
Nazareth: Robeson, Vice President (R) Tr. 28045, 28175-77.
National: Dannelly, Vice President (R) Tr. 39804.
Petoskey: Lucas, Vice President (R) Tr. 38794.
Southern States: Elcock (R) Tr. 37503-06.
Resp. Exs. 2817-2818.

[8] Resp. Exs. 511-518.

on four car loads of cement. He immediately came back on us with the information that we were at least 10¢ too high and we lost the business. Had we had your change in price by wire we could have sold all four cars of this cement. May we not request that in the future should there be any change in the price of cement, that you let us have information of this change promptly by wire, as we cannot meet local competition with a price that is 7¢ per barrel higher than anyone else.

Based along this same line we received your invoice of April 8th covering 200 barrels of cement, this cement is billed to us at $2.76 per barrel, whereas, the new price on cement of $2.69 went into effect April 7th. We shall except your credit memorandum to cover this error in billing.

We feel that we are correct in asking you to meet this price, as we have never handled any cement here except Alpha and since the first of January 1926 have handled through you over twenty-one (21) cars of cement. We therefore expect to buy your cement as cheaply as any other equal cement on the market. If you care for us to do so, we will send you quotations we have substantiating these statements. Please let us hear from you promptly in regards to this matter.'"[9]

As a result Alpha lowered its price at Wilson, adjusted its invoice and allowed the customer to deduct 7¢ per barrel on the cement already shipped and billed.[10] Coogan, Vice President of Alpha testified respecting these exhibits.[11]

Sweeney, Vice President of Edison explained a note on one of the company's price cards[12] showing that it had reduced its price twice in 3 days at Phillipsburg, N. J., as follows:

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[9] Resp. Ex. 512 A-B.

[10] Resp. Ex. 511.

[11] (R) Tr. 23215-21.

[12] Resp. Ex. 2553.

"A. The price shown on here, July 5, 1938, for Phillipsburg, N. J., was the destination, the lowest destination price which we at that time assumed had been quoted by competition. Several days later, however, we discovered that we were in error, and that the lowest quoted price for Phillipsburg, N. J., was $2.18, which we quoted on July 8th.

Q. When you say you assumed that in the first instance what the lowest price would be, what was the basis for that assumption, if you recall? A. Well, we had not taken up a written quotation for this particular delivery. We had picked up several others in the general territory and assumed that a certain base price was in effect applying to the whole territory. We discovered later that our assumption was incorrect.

Q. How did you discover that? A. Why, it was called to our attention by the dealer whose name appears on that card.

Trial Examiner Norwood: How soon did you discover that?

The Witness: It was about three days later, according to that card, your Honor.

By Mr. Werle:

Q. Do you recall any other instances of a character similar to that, Mr. Sweeney?

• • •

A. Yes. There were other similar instances where our assumption was incorrect, and that our competitors had quoted lower prices than we figured were in effect in a given market."[13]

Aetna and Southern States produced records of a similar character.[14]

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[13] (R) Tr. 35662-63.

[14] Aetna: Resp. Ex. 2010 N-O.
Southern States: Resp. Exs. 2817-2818.

6. How Base Prices Are Determined

The base price of a given mill is determined solely by the company operating the mill on the basis of a number of factors which are shown below.[1] There is no finding of agreement among respondents or any of them in the determination of base prices and all the evidence shows that there has been no agreement or understanding among them regarding the establishment, observance or maintenance of any base price.[2]

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[1] Alpha: Coogan, Vice President (R) Tr. 23152-53.
Ash Grove: Sunderland, President (C), Tr. 13643-44.
Com. Ex. 2416 B.
Federal: Bates, J. E., Sales Manager (R) Tr. 30591-92.
Hercules: Brobston, President (R) Tr. 26077, 26087.
Kosmos: Horner, President (R) Tr. 36812.
Lehigh: Bowen, Vice President (R) Tr. 26617, 26657.
Lone Star: Neylan, Asst. General Sales Manager (C) Tr. 6026.
Koch, Vice President (R) Tr. 47619.
Medusa: Dawson, Vice President (R) Tr. 40053.
Missouri: Alexander, President (R) Tr. 37122-23.
North American: Harte, Vice President (C) Tr. 8252.
Southwestern (Osborn): Warren, G. E., Vice President (R) Tr. 28798.
Universal Atlas: Affleck, President (R) Tr. 34798-99, 34847-48.
Wolverine: Nelson, J. L., Vice President (R) Tr. 36045.
The only evidence to the contrary is set out in Section 7, beginning at p. 484, *infra*.

[2] Alpha: Coogan, *supra*, Tr. 23376, 23363-64, 24573-74.
Hawkeye: Manley, General Manager (R) Tr. 41617.
Huron: Crapo, Vice President (C) Tr. 11392.
Lehigh: Bowen, *supra*, Tr. 26617, 26657.
Lone Star: Neylan, *supra*, Tr. 6026.
Medusa: Dawson, *supra*, Tr. 40053.
Missouri: Alexander, *supra*, Tr. 37122-23.
Monarch: Brooke, Vice President (R) Tr. 42192, 42333.
National: Dannelly, Vice President (R) Tr. 39632.
North American: Porter, President (R) Tr. 33816-17.
Northwestern States: MacDonald, B. A., Vice President (R) Tr. 36483.

A cross-section of the factors which the individual respondent producers consider in determining their respective base prices is provided in answers to the Burns-Clark survey wherein each producer was asked to "explain the elements entering into the calculation of your base price." The elements referred to in these answers included the following: competitive conditions and existing prices in the company's marketing area,[4] costs,[5] average re-

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Pittsburgh: Letzkus, Sales Manager (R) Tr. 37815-16.
Southern States: Elcock, Vice President (R) Tr. 37603-04.
Southwestern (El Paso): Blair, W. R., Sales Manager (R) Tr. 39249.
West Penn: McKee, Vice President (R) Tr. 27711.
Wolverine: Nelson, J. L., Vice President (R) Tr. 36045.

[3] See Question 21, *e.g.* Com. Ex. 969-3 o.

[4] Alpha: Com. Exs. 968-8 V, 9 U; 969-2 S; 970-16 F; 970-10 D; 975-20 E; 976-9 N; 975-4 o.
Ash Grove: Com. Ex. 976-7 H, 7 Z (Consider average net which will result and whether it can meet competitive prices).
Colorado: Com. Ex. 967-12 B.
Coplay: Com. Ex. 969-9 J (competition fixes it).
Giant: Com. Ex. 969-11 J ("competition").
Kosmos: Com. Ex. 970-1 N.
Lawrence: Com. Ex. 969-6 Z ("competition").
Lehigh: Com. Ex. 969-15 D.
Louisville: Com. Ex. 975-18 Y.
Monarch: Com. Ex. 976-8 U.
Nebraska: Com. Ex. 976-5 D (to meet competition).
North American: Com. Ex. 969-9 J (entirely governed by competition).
Penn-Dixie: Com. Ex. 968-7 H, 13 T.
Three Forks: Com. Ex. 967-12 R, 14 R.
Universal Atlas: Com. Ex. 968-4 R, 5 I.

[5] Alpha: Com. Exs. 968-8 V, 9 U; 969-2 S; 970-16 F; 970-10 D; 975-20 E; 976-9 N; 975-4 o.
Colorado: Com. Ex. 967-12 B.
Consolidated: Com. Ex. 976-5 T, 6 N.
Edison: Com. Ex. 969-8 R.
Florida: Com. Ex. 975-13 Y.

turn,[6] conditions at the mill,[7] volume of business available,[8]

Glens Falls: Com. Ex. 969-13 T.
Idaho: Com. Ex. 967-7 B.
Kosmos: Com. Ex. 970-1 N (costs and selling expense).
Lehigh: Rader, Vice President (C) Tr. 12992-93.
Com. Ex. 969-15 D (cost of production).
Lone Star: Neylan, Asst. General Sales Manager (C) Tr. 6615-16 (Mfg. Costs, Overhead, Depreciation, Taxes, etc.).
Com. Exs. 969-3 o; 971-9 Q, 9 R (mfr. costs, selling, packing, loading, taxes, depreciation).
Medusa: Com. Ex. 970-12 P.
Monarch: Com. Ex. 976-8 U (mfr. and selling costs)
Nazareth: Com. Ex. 969-10 A (principal element).
Northwestern States: Com. Ex. 975-2 P (mfr. and selling costs).
Penn-Dixie: Browder, Traffic Manager (R) Tr. 38142-43.
Com. Ex. 968-7 H.
Superior: Davis, President (R) Tr. 29567-70.
Three Forks: Com. Ex. 967-12 R, 14 R (prod).
Trinity: Com. Ex. 967-17 Q, 18 K (mfg. overhead shipping sales).
Universal Atlas: Com. Ex. 968-4 R, 5 I.

[6] Alpha: Com. Exs. 968-8 V, 9 U; 969-2 S; 970-16 F; 970-10 D; 975-20 E; 976-9 N; 975-4 o.
Ash Grove: Com. Ex. 976-7 H, 7 Z.
Consolidated: Com. Ex. 976-5 T, 6 N.
Florida: Com. Ex. 975-13 Y.
Louisville: Com. Ex. 975-18 [illegible].
Medusa: Com. Ex. 970-12 P.

[7] Penn-Dixie: Com. Ex. 968-5 Y, 6 Q, 7 H (labor strikes, etc.).
See also Browder, Traffic Manager (R) Tr. 38142-43.

[8] Alpha: Com. Exs. 968-8 V, 9 U; 969-2 S; 970-16 F; 970-10 D; 975-20 E; 976-9 N; 975-4 o.
Colorado: Com. Ex. 967-12 B.
Consolidated: Com. Ex. 976-5 T, 6 N.
Florida: Com. Ex. 975-13 Y.
Lehigh: Com. Ex. 969-15 D.
Penn-Dixie: Com. Ex. 968-7 H.
Three Forks: Com. Ex. 967-12 R, 14 R.

the price at neighboring bases,[9] the desire to discourage invasion of the company's local market by competitors and to discourage the establishment of new mills,[10] and freight rates.[11]

There was a considerable body of evidence that competitive conditions and prices in the company's marketing area were the controlling factors (and in some cases the only factors) to be considered.[12]

The most comprehensive statement of the factors considered is that given in Lone Star's pamphlet on "Trade Ethics and Marketing Policies" which is in evidence as Com. Ex. 1112 and Resp. Ex. 21. Under the title "Cement Prices," Lone Star sets out an analysis of "the various

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[9] Monarch: Com. Ex. 971-30 P.
Penn-Dixie Com. Ex. 968-5 Y, 6 Q, 7 H.
Riverside: Com. Ex. 967-9 L.

[10] See, *e.g.* Hercules: Com. Ex. 971-9 A-C.
There was a substantial body of testimony as to this aspect. See Sec. D, 4, pp. 390-398, *supra* and see also:
Bowen, Vice President, Lehigh (R) Tr. 26616.
Neylan, Asst. General Sales Manager, Lone Star (C) Tr. 6176-77, 6723-25.
Dawson, Vice President, Medusa (R) Tr. 40051-52.

[11] Florida: Com. Ex. 975-13 Y.
Consolidated: Com. Ex. 976-5 T, 7 N.
See also Brooke, Vice President, Monarch (R) Tr. 42291-92.

[12] See evidence cited in fn. 4, *supra*, p. 472.
Also:
Alpha: Coogan, Vice President (R) Tr. 23988, 24462-63.
Lehigh: Bowen, *supra*, Tr. 26616, 27221.
Com. Ex. 969-15 D.
Medusa: Dawson, *supra*, Tr. 40053-55, 40412-14.
Monarch: Com. Ex. 976-8 U.
Penn-Dixie: Browder, Traffic Manager (R) Tr. 38142-43.
Com. Ex. 968-7 K, 13 T.
Three Forks: Com. Ex. 967-12 R, 14 R.
Universal Atlas: Com. Ex. 968-4 R.
Affleck, President (R) Tr. 34797-98.

factors and conditions which control our price" and after discussing "the commodity," "quality of the commodity," "the market" and "transportation," stated:

"THE PRICE

The price of LONE STAR Cement is made up of the following:

1. Manufacturing Cost,

   the major parts of which are labor, fuel and supplies; over all of which we have no control;

2. Selling Cost;

3. Packing and Loading Costs;

4. Taxes and Depreciation Costs; and

5. Reasonable Profits on our Investments.

The total of these items, equals what we term our 'Base Price.' This 'Base Price,' plus transportation charges, would constitute the delivered price in every market if we had no competition.

The price we actually quote any cement buyer is influenced by two factors:

First—Our 'Base Price,' plus the freight charge from our mill to the customer's town;

OR

Second—Our competitor's 'Base Price,' plus the freight charge from his mill to the customer's town.

In the first instance, our 'Base Price' is the *maximum* return which we receive even in those towns which, due to their location, enjoy a lower freight rate from our mill than from our competitor's mill.

[Italicized part quoted in Fdgs. Par. Six (b)]

In the second instance, as we cannot get more than our competitor's price, we quote a price which we expect will be identical with that asked by the competitor whose lower freight rate gives his product the advantage at that point.

As good will and continued patronage are the only premiums the trade will pay for LONE STAR Cement, it is obvious that in order to make a sale, we must meet the lowest *bona fide* price quoted the buyer by any other reputable manufacturer. This is exactly what we do in the second instance!

* * *

* * * We do not know of any other industry in which adjustment of the price of its commodity is so automatically fixed by agencies beyond its control.

* * *

Every mill has, to a certain extent, an advantage over distant mills, in its nearby territory. Unless its 'Mill Base' price is unreasonably high, it can always have some advantage. But if that price is unreasonable, it is an invitation for the invasion of its nearby territory by competing mills." (pp. 23, 25)

In connection with the Burns & Clark survey Dr. Burns wrote Lone Star for further light on how Lone Star determined its base prices, particularly, the effect of changes in neighboring bases. The questions and answers in this respect are set out below:

Question 21—It is stated that a base price is determined with reference to costs and a reasonable return on investment. Again I should like to know how the base price would be determined for this mill when the industry as a whole is not making profits. In answer to part A of the same question, it is stated that no changes in base price would be made at this mill as an out-come of changes at a neighboring base unless costs had increased or decreased over a wide area. Are we to assume that if changes in price are made at a neighboring mill and there are no changes in costs which would also affect your mill, your mill would maintain its own price, and, in the case of a price decrease, merely absorb more freight in the neighboring territory?

Explanation: During a period of depressed conditions like this country has been passing through

the past several years, carrying with it decreased cement consumption, a base price cannot always be established on the basis of a reasonable return on investment. In other words, during such periods economic conditions will not permit a manufacturer to increase prices sufficiently to insure a fair return. It becomes necessary for the manufacturer to retrench, cease payment of dividends, and call upon reserves with the hope of weathering the depression until economic conditions improve and the volume of cement consumed increases.

Your outline of what this plant would probably do as a result of an increase or a decrease in the base price of a neighboring plant is essentially correct. The base prices of neighboring plants have often been changed without this plant taking any action with reference to its own base price.[18]

• • •

Question 21—Again I would like to know how the base price is calculated at this mill when the industry as a whole is not making profits; and under what circumstances the mill would decide to maintain its base price in the face of a reduction in a neighboring base, taking lower nets in neighboring territory instead of lowering its own base price to meet the neighboring reduction.

Answer—Assuming profits eliminated for the industry as a whole, we would say that the same factors, with the exception of profits, as outlined in our original answer to Question 21 would apply. In this case, however, the distribution factor would be all important in arriving at our mill base. When bases are reduced at neighboring mills, the influence of such reductions extends into our price making territory and partially defeats the purpose of our base price. The purpose of our base price does not change with reductions. It is our intention to maintain a competitive position and give to the cement buyers, within a reasonable radius from our mill, the benefit of our mill location and at the same time make the

[18] Com. Ex. 971-9 Q-R.

> business in that territory less attractive to competition. Circumstances have not yet arisen wherein our base was maintained in the face of reductions at neighboring mills.[14]

Several witnesses testified as to the manner in which they determined their base prices.

Affleck, former President of Universal Atlas, testified that the "original fixing" of the base price as distinguished from changing it in the course of years was based:

> "* * * on what the owner or the manager of the plant thinks can be obtained, the price at which the products can be marketed, the price base or the price is made by competitors in the territory where the product is marketed; those factors all come into the situation and determine what the price base shall be when a new mill is started."[15]

Affleck testified, however, that price base changes are influenced "almost entirely by competition."[16]

Bowen, Vice President of Lehigh, asked what method Lehigh adopts for arriving at base figures at its mills, testified as follows:

> "A. Well, that is entirely a matter of business judgment. We take into consideration all the conditions as we find them in the territory with which we are dealing. On the one hand, we want to get as much for our product as we can, and then there are a number of factors that tend in the opposite direction. I can name a few of them.
>
> First, we want to get prices around our mills which, while if possible returning a profit to us, will at the same time make it as tough for our competitors as we can. We like to have prices that will not be so high as to induce the use of competing mate-

[14] Com. Ex. 971-9 N.

[15] (R) Tr. 34798.

[16] (R) Tr. 34799.

rials, or prices so high as to encourage construction of new mills in the territory, and, perhaps most important of all, we want the prices that there is some hope that our competitors will respect, because in the last analysis it is competition that determines the price that we can get.

In every case, as I have said, it is just a matter of applying our best business judgment to all the circumstances.[17]

Cross-examined on this, Bowen testified as follows:

"Q. How do you go about arriving at the base figure that your company establishes? A. Well, in every case where consideration ranges over all the facts and conditions existing in the territory affected; we talk about possible changes whenever, in the judgment of anyone, such a change would be desirable. We discuss it thoroughly. Sometimes we make the changes and sometimes our decision is to make no change at that particular time.

Q. Well, assume that you have a certain base price figure in effect at your mills at a given time. How do you determine whether or not that figure should be continued? A. Well, by giving consideration to the nature of the competition existing in the territory; to the question of whether we are making any money or losing money, and with regard to a number of general conditions which I endeavored to state in my direct examination, which are the underlying fundamentals. That is, we want a price that will give us the best possible return in the face of competition, and our desire to get a price at which our product will sell.

Q. Do you arrive at your base prices by building up your costs and adding a certain amount for profit above costs? A. Oh, no.

Q. Well, is the competition situation the primary or dominating consideration in the level at which you will fix your base price figures? A. I would say it was one of the primary factors, Mr. Wooden, although in any situation which involves judgment, and

[17] (R) Tr. 26616.

which, from time to time takes into account a great many different factors, it is rather difficult to say that one outweighs the other.

Q. Can you name any other that equals it in importance? A. As a matter of judgment, I don't know that I ever tried to rank the factors in importance, and I don't know that I am able—all other factors taken into consideration, it certainly is competition which finally determines whether a given change in price is practicable.

Q. Or whether the maintenance of an existing base figure is practicable? A. Oh, yes.

Q. Are you not guided by the same consideration with regard to increasing your base price if other base prices permit, that you are in increasing destination prices when destination prices of competitors will permit?

• • •

A. I am not sure that I understand that question, Mr. Wooden.

I will say this: That if in our judgment conditions in the territories in which we operate are such that an advance in our prices is desirable, we advance those prices.

By Mr. Wooden:

Q. And don't you advance your base prices when other base price advances permit you to do so? A. We advance prices figured on our mills, and whenever we make an advance, sometimes that is done in periods when in neighboring territories competitors have advanced their prices. That would be a factor that would enter into our consideration.

Q. Well, you mean when competitors advance their base prices? A. I am referring to their prices in the field.

Q. But don't those reflect advances in their base prices? A. They reflect an advance in their base figures, surely.

Q. If you didn't put your base price upward when other adjoining base prices went up, you would be enlarging your territory at the expense of the other

base mill, wouldn't you? A. Not enlarging the territory in which we sell. Of course, we would enlarge the territory in which our prices would be figured in our own base figure.

Q. That's what I meant. A. And that has frequently happened.

Q. Doesn't that happen in periods of price uncertainty or price disturbance rather than at any other time? A. It happens from time to time most all periods. It depends entirely, and naturally any period where prices are changing more frequently the chances of that condition developing are increased.

Q. Given a base price that remained unchanged for a year or more and a freight rate that remained unchanged for a year or more, the territory in which the base price was effected would remain constant, wouldn't it? A. What you are saying is that if the prices are not changed over a year's period they are constant; that is true."[18]

Browder, Traffic Manager of Penn-Dixie, testified that the status of each of its mills and the price base of each mill "depends upon the competitive conditions existing in that particular mill's particular territory and upon the costs and other conditions peculiar to that mill.[19]

Coogan, Vice President of Alpha, explaining how Alpha determines the figure which it uses as a base, said:

> "Well, theoretically, the base figure which we would set at our mills, if there were no other factors involved, would be a figure which would return to us a normal profit. However, there are so many other conditions in the commercial and competitive field that our base figures have not been set this way for many years, that I know of, and I doubt if we were ever able to put them on that basis.[20]

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[18] (R) Tr. 27220-24.

[19] (R) Tr. 38142-43.

[20] (R) Tr. 23988.

As to this he was examined on cross examination as follows:

"Q. Isn't what you mean there chiefly that the volume isn't adequate to enable you to come out with a profit at the unit price that you have set?

• • •

A. Well, certainly, we have not made any profit or measurable profit—we have made a little profit in a few years, but we have lost money since 1931.

By Mr. Wooden:

Q. Well, isn't that chiefly because of lack of volume? A. Either that or smallness of price.

Q. Well, that is what I am trying to get at. A. Well, if you had sufficient price with the lesser volume, you could still show a profit.

Q. If you had a large enough margin you could show a profit on a thousand barrels a year? A. Sure.

Q. That is just theoretical, of course, but it is impossible at the same time. A. Sure.

Q. But what I want to get at is, when you fix your base price and in advance of knowing what the volume is going to be or even what your costs are going to be in the future, how do you go about it? What elements do you include? What items do you include in that? A. Well, Mr. Wooden, it isn't a difficult problem to estimate what the demand is going to be.

Q. Yes. A. And it is not a difficult thing to project your probable cost based on your past experience.

Q. Do I understand that you take your past record or experience of costs and then add what you think is a sufficient margin per barrel to enable you to come out with a profit on the whole business?

• • •

A. Well, I told you that we had not been able to set our prices in that manner. The competitive and commercial conditions made that impossible.

Trial Examiner Norwood: I know, but he wants to find out if you figure your first costs that way before you adjust it to competition.

The Witness: Well, that is the way it would be perfectly natural, for us to figure it that way based on our past experience and projected costs.

By Mr. Wooden:

Q. And you figure your costs on a per-barrel basis in that connection? A. Yes, everything is figured on a barrel basis.

Q. How much do you add for profit per barrel after you get your costs all figured out?

• • •

A. That would be arrived at in our company by consultation among the executives. My own personal view is that we should have a profit based on present shipments of approximately 30 cents a barrel.

By Mr. Wooden:

Q. And is that reflected in your base price at present? A. I told you we hadn't been able to make our base prices on that basis.

Q. Yes, I know, but is that what you are endeavoring to do in figuring the base price? A. I said that is what we would do if there were not other factors involved."[21]

(The evidence showing that companies often establish a base at their mills in order to make lower prices to discourage heavy invasion of the companies' nearby marketing area by competitors has already been digested under section D, 4, *supra*, pp. 390-398.)[22]

Monarch reported to Burns & Clark that a decrease in one base almost always forces a like or proportionate decrease on its neighbors.[23]

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[21] (R) Tr. 24462-65.

[22] See also Bowen, Vice President, Lehigh (R) Tr. 26616.
Neylan, Asst. General Sales Manager, Lone Star (C) Tr. 6176-77, 6723-25.
Dawson, Vice President, Medusa (R) Tr. 40051-52.
Com. Exs. 971-9 B, 971 A-C.

[23] Com. Ex. 971-30 P.

Penn-Dixie explained the effect on its base prices of a change in neighboring bases as follows:

> "Such change does not necessarily affect our base price, but it may. If the neighboring base price is lowered it may make the prices in a large part or all of the territory formerly basing on our mill and thereby make desirable a lower base price at our mill even though we feel that our base price 'per se' is sufficiently low.
>
> Again if the neighboring base price is increased, it may be desirable to increase our base price to such a figure as we may feel is more in line with current costs.
>
> In either case the change in our base price may or may not be in the same amount as the change in the base price of the neighboring base mill."[24]

Bowen, Vice President of Lehigh explained this as well as the effect of an increase in neighboring bases in his testimony quoted *supra*, pp. 478-481.

7. So Called Punitive Bases

Among the topics surveyed by Professors Burns and Clark in their inquiry concerning methods of sale pursued by cement manufacturers[1] was the so-called imposition of an involuntary base upon the mill of a competitor. Reports concerning such incidents were collected by the Professors in response to question 15 of their questionnaire. The tabulation on the next page shows the manner in which the question was put to the various mills in the questionnaire, the number of mills for which answers were submitted and the number of affirmative and negative answers to the

[24] Com. Ex. 968-5 Y, 6 Q, 7 H.
See also Lone Star response to inquiry from Dr. Burns on this point, *supra*, p. 476.

[1] For the evidence and relating to the Burns and Clark Survey, its purposes and operations; see Part XI, D, *infra*.

Question 15	Mills Answering	Answered "No"	Answered "Yes" Company	Mill	Com. Ex. No.
B.1. Have you, on any occasion since January 1, 1925, converted your mill from a non basing point to a basing point mill because a manufacturer not producing at your point has begun to quote delivered prices using the location of your mill as a basing point?			Ash Grove	Louisville	976-7 U, 7 V
			Kosmos	Kosmosdale	970-1 i, 1 J, 1 Q, 1 Y, 1 Z
			Louisville	Speed	975-18 T, 18 U, 10 i, 19 J
			Nebraska	Superior	976-4 Q, 4 R
			Penn-Dixie	Richard City	975-8 M, 8 N, 9 E, 9 F
i. Date of change.					
ii. Name of manufacturer.	142	136		Clinchfield	975-9 U, 10 K, 10 L
iii. Can you offer any explanation for the change being made by the rival manufacturer?			Southwestern	Osborn	970-3 A, 3 B, 3 M, 3 N
iv. Had you already quoted delivered prices in some parts of the territory subsequently governed by your base which suggested that a base price was already in operation?					

question. As shown by the tabulation, 10 mills out of 144 mills asserted that they had "converted" their mill "from a non-basing point mill to a basing point mill because a manufacturer not producing at your point has begun to quote delivered prices using the location of your mill as a basing point". In this connection, the questionnaire stated that

> "any statement concerning rival manufacturers which may be contained in the answers to question 15 will be referred to the manufacturers of whom complaint is made in order that their interpretation of the facts may also be considered."

In keeping with the statement, in each case where a "complaint" was made against a rival manufacturer, the Professors gave that manufacturer an opportunity to explain the circumstances. These explanations from a number of companies are in evidence in the form of letters.

The evidence explaining and giving the circumstances surrounding the imposition of the various bases is shown in part in answers to the subdivisions of question 15 of the questionnaire, in letters of explanation to the Professors, in other writings of respondents at or about the time of the incidents and by oral testimony. This evidence is collected and digested separately with respect to each of the mills upon which a base was said to have been imposed.

The evidence shows further that there was some initial difference of opinion as to the manner in which the Professors should frame the question seeking information on this point.[8] Thus, at the time the questionnaire was being formulated and under date of March 21, 1935, Joseph S. Young, President of Lehigh, wrote to Dr. Arthur R. Burns as follows (Com. Ex. 971-4 Q-4 R):

> "I appreciate very much indeed your courtesy in passing on for my consideration the amendments to question 15 suggested by the Federal Trade Commission. On the whole I believe they do further

[8] Com. Exs. 913-6 T-U, 7 I; 971-4 Q-R.

clarify the points at issue. Moreover the effort to induce the complainant to cite the name of the accused company in my opinion is excellent. However, the suggested amendments to 15 A. 2 and 15 C. 2 again raise the contentious question which we have discussed on several occasions. The addition of the phrase 'although it subsequently emerged that no base price had been installed by the mill there' seems unfortunate in that an answer to the question in this form might be interpreted as an admission on the part of the company meeting lower competitive delivered prices in the field that no base price had been installed at the mill of the price cutter. Whether or not cuts made by a competitor in the field result in a lowering of his base price is a moot point. It is my contention that any manufacturer finding such competitive cut prices in the field has every right not only to meet the cut prices as discovered but also to quote prices generally in that territory predicated on the assumption that the competitor has in fact reduced his base price. Furthermore, before taking such action to meet competitive cut prices, according to my theory it would not be incumbent upon a manufacturer to inquire of his unfriendly competitor whether or not the cut prices in the field constitute a reduction in the base price. Therefore I would be reluctant to answer 15 A. 2 and 15 C. 2 in the amended form because I should not like to go on record that after Lehigh attempted honestly and openly and fairly to meet competitive cut prices in the field it later developed 'that no base price had been installed' by the offending competitor."

Young then suggested that perhaps the question should be worded to "inject the element of intent" perhaps reading in part as follows: "although it subsequently developed that the competitor whose delivered prices you were meeting did not intend to install a base at his mill". This he said would prevent the question from being interpreted to cover the case "of the conversion of a non-basing point into a basing point where the mill itself has taken the lead

in making the change". It appears from question 15 as finally framed by the Professors that neither Mr. Young's nor the Federal Trade Commission's suggestion was adopted verbatim.

a. Louisville, Nebraska

In response to Question 15 B of the Burns & Clark Questionnaire, the non-respondent Ash Grove Lime & Portland Cement Company of Nebraska[1] reported that effective April 18, 1931, Lehigh had begun to quote delivered prices using the Ash Grove mill at Louisville, Nebraska, as a basing point.[2] Ash Grove answered further that it had not theretofore quoted delivered prices which suggested that a base price was already in operation at Louisville, Nebraska, and that the effect of this action by the Lehigh Company was "to damage us greatly while injuring said rival only slightly—an ante—Clayton Act method of restraining competition and destroying competitors.[3]

The mill at Louisville went into production in 1929[4] and Sunderland, President of the Company, testified that its mill became a basing point on April 18, 1931. He defined a basing point as the maximum net plus the transportation charges to the market where that combination is the lowest price at that market.[5] In explaining how this came about, Sunderland said:

> "A. Well, we found on [sic] territory quotations from a competitor deducting freight charges to the market points covered by those quotations, checked back to a maximum at our Louisville plant, which

[1] Sunderland, President, Ash Grove (C) Tr. 13575-76: Ash Grove owns a majority of the stock of this Company.

[2] Com. Ex. 976-7 U-V.

[3] Com. Ex. 976-7 V.

[4] Sunderland, *supra*, Tr. 13576.

[5] Id., Tr. 13590, 13593-94.

was less than we had been charging theretofore, and that was the first time that that condition existed.

* * *

Q. What competitor was it that put in that base price at Louisville? A. The Lehigh Portland Cement Company. That is, it was the Lehigh Company's quotations that I referred to.

* * *

Q. Is it a fair statement that you were forced to put in a base at Louisville by the act of competitors? A. Well, we were forced to meet prices we found in the territory, otherwise forego our business."[6]

F.T.C. Investigator Bass testified concerning an interview he had with Sunderland as to the Louisville base as follows:

"Mr. Sunderland stated that this plant at Louisville, Nebraska, was built by him in 1929, and he never intended it to be a basing point, but that in 1932 one of the largest cement companies, which operates a number of plants in the United States, whose name he would not disclose, made this plant of his at Louisville a basing point and depressed what had been the price theretofore, and not only did this large cement company make this a basing point, but that the cement company was acting in concert with two or three other competitors and by agreement made Louisville, Nebraska, a basing point, which Sunderland told me he considered a violation of the Anti-trust laws, and since then, 1932, Louisville, Nebraska, has been a basing point."[7]

Sunderland was examined about this conversation as follows:

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[6] (C) Tr. 13594-95.
See also Com. Ex. 976-8 G, Ash Grove Burns & Clark Questionnaire Answer.

[7] (C) Tr. 13398.

"Q. Have you read Mr. Bass' testimony about his interview with you? A. Well, I think I have read excerpts from it, abstracts.

Q. Did you read that portion of his testimony in which he testified that you had told him that the establishment of a base at Louisville, Nebraska, was the result of an agreement among various competitors? A. I read that and that is not accurate, Mr. Wooden.

Q. Will you make such corrections as necessary to make it accurate? A. Well, first, I will say that I didn't think at that time, I haven't thought since, and I don't think now that the action of Lehigh Company in setting maximum net at our mill through their delivered prices throughout our local trade territory was then under or by reason of any agreement with any competitor. I think they were playing the lone wolf in that proceeding."[8]

Prior to the establishment of the base Louisville, in figuring its prices, net quotations current at destinations through its market territory.[9]

Sunderland testified that the effect of the base was to reduce the mill's earnings from 25 to 30 cents a barrel, possibly 50 or 60 cents a barrel, depending upon the destination of the cement and that it had done nothing, such as cutting prices, to account for the establishment of a base at its mill. It was his recollection that the quotations checked back to a net maximum at Louisville of $1.10 gross or $1.00 net.[10] He thought that Lehigh did not get any higher net at its own mills than the Louisville net, but he could not say whether that was so "all the time that our maximum obtained", and he did not know that that was so as to all of Lehigh's mills. Lehigh, he said, continued to sell in his nearby territory but that they "were not doing

[8] (C) Tr. 13720-21.

[9] Id., Tr. 13595.

[10] (C) Tr. 13602-03.

a great deal of business there during that period". Lehigh, on business in Louisville's area, was "obviously" taking a less net at their mill than Louisville's base.[11]

In answering the Burns & Clark Questionnaire, Ash Grove stating the effect of the base at Louisville said:

> "This change did not affect volume of shipments from our mill or the sales territory covered. It resulted in a great reduction in the realized mill nets on shipments to all our freightwise trade area. * * * As a result of the decreased selling price received, it was necessary to reduce wages and salaries, curtail expenditures, and reduce activities (requiring expenditure of funds) of every kind wherever it was possible to do so."[12]

Sunderland said he had "probably protested" to Colonel Young of Lehigh, who has since passed on.[13] Asked the nature of his protest he testified:

> "A. Well, that I didn't think it was fair trade practice or fair competition, that I thought, therefore, it was unethical, and that I regarded it in the same relation to the conduct of the cement industry as bushwacking and guerilla warfare bears to military tactics.
>
> Q. Will you explain wherein you consider it unfair and unethical? A. Well, it was usurping a right that we considered was ours exclusively and alone without collaboration or conference or consultation with or conversation with any competitor in the world; that we ourselves had the sole right, so I considered, to determine what maximum amount we were willing to take as our price practice in the conduct of our business.
>
> Q. Well, do you consider, in other words, that you were the only one who had the right to put in a base

[11] (C) Tr. 13605.

[12] Com. Ex. 976-8 G.

[13] (C) Tr. 13603.

> at Louisville? A. I certainly do; determining the base as I have described it, Mr. Wooden."[14]

Colonel Young's response was unsatisfactory to Sunderland and he got "no explanation as to why it had been done."[15]

It was Sunderland's impression that the mills with the most ethical management and most of the smaller independent companies regarded this practice with disfavor.[16] He regards mills with the most ethical management as

> "those who do business within what is regarded by the industry, and, I believe, by the Commission and the law, the fair trade practices, fair competition * * * the most constructive thought in the industry regarded that sort of industrial warfare with disfavor." (Tr. 13608)

Lehigh, in its answer to the Burns and Clark Questionnaire, and through its Vice President, Bowen, denied that it had imposed a base on any competitor's mill.[17]

Professor Burns wrote J. S. Young, President of Lehigh, on October 5, 1935, calling his attention to several instances where competitors claimed that Lehigh had put in bases at their mills.[18]

Young replied in a letter dated October 30, 1935 explaining Lehigh's action in each instance.[19] As to the matter generally, Young said:

> "* * * I might say at the outset that we are delighted to be given this opportunity to answer the several

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[14] (C) Tr. 13603-04.

[15] Sunderland, President, Ash Grove (C) Tr. 13611.

[16] Id., Tr. 13608-09.

[17] Com. Exs. 969-14 T, 969-15 P, 969-16 G, 969-17 B, 969-17 S, 968-1 i, 968-1 Z, 968-2 W, 968-3 R, 970-5 X, 975-15 E, 975-15 X, 975-11 B, 975-11 R, 975-3 Q, 967-15 X, 967-6 B. (R) Tr. 27280 (see also, *infra*, pp. 495-500).

[18] Com. Ex. 913-3 Q-R.

[19] Com. Ex. 971-23 N-S.

charges cited against us because we are extremely anxious to demonstrate that in the cases in question Lehigh was merely attempting to meet competitive prices actually found in the field and was not in any sense of the word attempting to reduce existing competitive bases or impose new bases where none had existed before." (Com. Ex. 971-23 N)

As to the Louisville, Nebraska, base he continued:

"In sending out new lower quotations to the trade in Nebraska on April 17, 1931, Lehigh used in addition to other bases, a base of $1.00 at Louisville, Nebraska. During the early months of 1931 the Ash Grove Cement Company was freely offering its product at lower than published prices to net somewhere in the neighborhood of $1.00 a barrel at Louisville. The following excerpt from a letter just received from B. H. Rader, our Vice President and Western Sales Manager, vividly portrays competitive conditions existing at this time in the Nebraska market:

'In spite of the fact that until April 17, 1931, no bases had been established in Nebraska, mills located in neighboring states were almost entirely frozen out of the Nebraska market. Yet at the time the Louisville mill was actually competing with our Mason City mill for dealer and contract business in Iowa and was quoting prices on contract business particularly paving work, that were considerably under the market prices existing in Iowa at that time. * * * By having no base at Louisville, the Ash Grove Company could well afford financially to follow this practice in Iowa, as any losses or lack of profits resulting from such business were more than made up for on its high mill net Nebraska business. I have only to cite the tremendous falling off of our own shipments into Nebraska after the establishment of the mill at Louisville, to prove this point. In 1926 we shipped 142,000 barrels into Nebraska. In 1929 we shipped 84,000 barrels. For the year 1931 this had dropped to 25,000 barrels and in 1932 to 9,700 barrels. * * * Only one other company besides the two companies operating plants in Nebraska has been able to

make any shipments of consequence in recent years into Nebraska due to the fact that the largest and strongest paving contractor in Nebraska is a heavy stockholder and a director in the Monarch Cement Company, and through him Monarch has been able to maintain a fairly decent business in that state. All other companies that formerly enjoyed a profitable business in that state have been practically frozen out of that market since the advent of the mill at Louisville'." (Com. Ex. 971-23 O-P)

Bowen, Vice President of Lehigh, testified at some length regarding this subject, generally as well as with reference to specific situations. In summary his testimony follows:

There was a price war in the cement industry in 1931 due to a sharp falling off in the demand for cement.[20] During the latter part of 1930 and continuing into 1931, Lehigh found a great many cases in which its competitors were offering to sell and were selling at prices below their published prices and below Lehigh's published prices. As a matter of fact, in many cases the prices appeared to vary from day to day and job to job. In other words, they were secret price concessions below competitors' published prices.[21] In explainjng what he meant by "secret prices" Bowen said:

"I will say that we found a great many cases in which competitors were making sales at other than their published quotations, and we found that they did not make the same price to all customers, but in some cases gave customers lower prices than the published quotations, while in other cases they did not give similar concessions." (Tr. 26896)

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[20] (R) Tr. 26893-94.
See Fdgs. Par. 6 (c).

[21] Bowen, Vice President, Lehigh (R) Tr. 26894, 26896-97, 27280-81.

A.

Tabulation of Affirmative and Negative Answers to Question 15 of the Burns & Clark Questionnaire[2]

Question 15	Companies Answering	Answered "No"	Answered "Yes" Company	Mill Affected	Com. Ex. No.
A.1. Have you, since January 21, 1925, sold at delivered prices which have in effect converted a mill at a point at which you do not produce from a non basing point mill to a basing point mill?			Alpha	Fultonham, Ohio Osborn, Ohio Cape Girardeau	970-15 X 975-4 J
			Hercules	West Conshohocken, Pa.	969-10 o
			Lone Star	Spocari, La.	975-5 U, 6 o
i. Name of basing point thus established.	57	53	Medusa	Fairport Fultonham & Osborn, Ohio	970-13 W, 14 N, 15 B
ii. Date of establishment.					
iii. Describe the circumstances in which the change was brought about.					

[2] Excluding Pacific Coast respondents.

Bowen testified that it was not Lehigh's policy to make sales below its published quotations:

> "A. Our policy was not to do so. For 20 years prior to that time we had been operating • • • on a one-price policy, by which I mean that we published our quotations and sold in all cases only at those published quotations. We thought that that was the only sound open way to do business, and adhered to it. (Tr. 26894)
>
> • • • what I mean by one-price policy, is to make our quotations publicly and openly and sell only at the prices so quoted, until we change our prices by newly published quotations." (Tr. 26913)

Lehigh was unable to sell its product at its published quotations in competition with these secret price concessions and it lost a great deal of business.[22] In an effort to reach a price level at which it could sell, it made a number of price reductions. Despite these reductions, Lehigh found that the secret price concessions still continued.[23] These reductions at Lehigh's mills amounted to from 60 to 70 cents per barrel, bringing them at most mill locations below $1.00 per barrel and in some cases as low as 80 cents per barrel.[24]

Bowen described in detail how Lehigh met this situation, as follows:

> "A. • • • At that time, still in an effort to arrive at prices which we could make openly and which we could sell at, we began in the spring of 1931 to quote prices which reflected base figures at some of the mills of our competitors from which we had found the greatest number of secret price concessions to emanate. In doing this the base figures were in no

[22] Bowen, Vice President, Lehigh (R) Tr. 26894.

[23] Id., Tr. 26896-97.

[24] Id., Tr. 26902.

case lower than the base figures of our nearest mills, nor were they lower than the base figures reflected by sales of substantial volumes of cement by those companies.

By and large our action was governed by two considerations: First, we had competition to meet and we had to meet it. Second, we wanted to make our prices open, to maintain those prices publicly, and to treat our customers all in the same manner so that we might hold the same reputation for fair open dealings that we had tried to build up." (Tr. 26897-98)

This method of quoting prices helped to clear up the practice of making secret price concessions and enabled Lehigh to obtain a considerable volume of business because, as Bowen explained, "* * * those competitors very quickly found that they could no longer get business at varying prices, but must take the price covered by our published quotations."[25]

Bowen testified that he did not know whether the plants that were making the price concessions considered themselves as basing points or non-basing points, but that their quotations showed definitely that they were no longer what Lehigh considered non-basing point mills.[26]

On cross examination, Bowen testified as follows:

"Q. When Lehigh put in these base prices at the location of other mills, in 1931, isn't it a fact that the Lehigh Company itself had taken some mill nets in some territory that was as low as the mill nets of these mills at which you established bases? A. Mr. Wooden, I don't know that I am prepared to accept the statement that we established bases at these mills, but dealing with a practical situation, I think I testified that we had at most of our mills reduced our prices so that the nets we were receiving were

[25] Bowen, Vice President, Lehigh (R) Tr. 26903-04.

[26] Id., Tr. 26907-08.

as low or lower, than the base figures we used, recognized from competing mills.

Q. Aside from that, when you went into other base mill territory didn't you reduce your mill net on some sale to just as low a figure as the mill net on these mills where you put in bases? A. If you mean the sales that we made at prices at which we were meeting competitive quotations returned us a net lower than our base figures, as low as the figures of competitiors you mentioned, yes.

Q. Yes. And then the objection was, wasn't it, that these non-base mills, or the mills that were making these low prices, were cutting somebody's base price; isn't that right? A. No, Mr. Wooden, I was not interested in what they were cutting. All I was interested in, the competitive situation at which we could not sell at our published prices irrespective of how our competitors were selling it lower than his published price, irrespective of how those prices were arrived at.

Q. They were cutting, in effect, your base price, weren't they? A. My only concern was they were cutting their own published destination price, and we were unable to sell because we would not make those kind of prices.

Trial Examiner Norwood: Were they cutting below your base price?

The Witness: Cutting below their own quoted destination price, and below ours, and because we would make our prices only openly we were unable to match that sort of competition; we were compelled to make public the prices which we hoped would enable us to sell.

Trial Examiner Norwood: Where you meet a single price at a single point, would you feel free to do that for the one sale without publishing the price generally?

• • •

The Witness: Yes.

I would make this distinction, your Honor: If a manufacturer simply published a reduced price to a given destination then you would have

a situation similar to what we have had many times around Long Island, where a manufacturer has reduced one price to put a given dealer in a better competitive situation. I have the choice then as to whether to accept merely that reduced price or to reduce other prices. I may do either one. I distinguish between that and a manufacturer having a published price in a given market and selling below that price, and that our company has not wanted to do so and has not thought it was sound business to do.

By Mr. Wooden:

Q. And where you found competitors making such deals or transactions secretly, you say you put in a price that made them take as low as that on all their business; isn't that right? A. That was one of the effects of our action.

Q. Don't you know that that action had a very serious effect upon the ability of such a concern to stay in business? A. I do not think so, and I know that their action which led to ours had a very serious effect on our ability to do business along the line that we considered fair, open, and honest.

Q. Did you have any of these mills where you made a price base complain to you about it? A. No.

Q. Never heard any objection raised by any of them to the fact that you had put in a base at their mill? A. Oh, I have heard from our various reports about the things that they have said about us. I know of no case where any manufacturer has protested to us directly.

Q. Or to Colonel Young, or anybody connected with your company? A. I know of none.

Q. Don't you know as a matter of fact that a dispute over that question almost disrupted the Portland Cement Association in 1931 and 1932?

• • •

The Witness: I know that in 1931 or in 1932 a great many members dropped out of the Portland Cement Association, and, I have heard a great many sort of reasons alleged.

By Mr. Wooden:

Q. Didn't you hear that reason among them? A. I heard that, many reasons, or excuses." (Tr. 27270-75)

And later:

• • •

"A. • • • I am talking, now about prices which indicated a departure on their part from their previous practice, indicating that they were no longer operating as what we considered non-basing mills, but that they had elected to become base mills, at least to the extent of some of their sales." (Tr. 27281)

• • •

"A. I do not think that there were any mills in 1931 or 1932 became basing-point mills through the actions of their competitors, that they became so primarily by their own action. • • •

• • •

Q. Is it your intention to say that the mills that you named voluntarily put in basing points at their own mills? A. Mr. Wooden, I have already said that everything that we considered at any time in those days was the practical situation of the kind of competition which confronted us in the field.

Q. Well, will you answer my question? I want to clear up a statement you made a moment ago as to what you intended by it." (Tr. 27275)

• • •

"A. Well, I would say that their quotations and sales did operate to make those mills basing-point mills, and I assume that they made those quotations of their own volition." (Tr. 27276)

The action of Lehigh was referred to in a letter from McCourtie of Trinity to J. S. Young of Lehigh under date of April 23, 1931, responding to a request from Young as Chairman of the Public Relations Committee of the PCA

for information as to the capacity of Trinity's plants (Com. Ex. 1195 A, B). Refusing to give the information, McCourtie wrote:

[Italicized part quoted in Fdgs. Par. Ten (e)]

"If one of the larger units in the industry—such as the one with which you are identified—can justify the broadcasting of quotations three or four hundred miles further from its mills than it ever heretofore has made either quotations or shipments, and to which territory it does not expect to make any shipments—the quotations being made simply for the purpose of compelling another manufacturer, legitimately and properly serving that territory, to sell his product at a much lower price than he otherwise would—then I can see no very good reason for maintaining an Association, nor to further attempt any active cooperation with such units.

Frankly, I cannot make myself enjoy the idea of any other company giving away my money, not only without saying 'by your leave', but without a commercial grievance of any kind against us that would in any sense justify such action.

If—as—and when—the executives within the industry again pull themselves together, act sanely and do business as business ought to be done, there will be no difficulty in obtaining our cooperation all along the line and in every proper way."

b. Superior, Nebraska

In answer to the Burns & Clark questionnaire, Nebraska stated that on April 27, 1931, Lehigh had begun to quote delivered prices using Superior, Nebraska as a basing point.[1] Nebraska stated that it had not quoted delivered prices which suggested that a base price was already in

[1] Com. Ex. 976-4 Q.
Nebraska attributed this base to Monarch at the time it occurred (see p. 504, *infra*) and Lehigh said that its quotations reflecting a base at Superior followed quotations by Monarch (see p. 506, *infra*).

operation at its Superior mill and that the action of Lehigh "resulted in great damage to us by forcing the sale of contracted tonnage at greatly reduced prices. Also reduced revenues on all other tonnage."[2]

At another point in the questionnaire respecting any changes of Nebraska's mill from a non-base to a base mill, Nebraska stated:[3]

> "On April 27, 1931 a base was placed on our mill of $1.50. On May 2 it was applied in Kansas territory. We found quotations of competition on this basis and had to meet them. This competition had placed the base of $1.50 on our mill in quoting these prices which we encountered. This continued through 1931. This was a ruinous move by competition to cut prices with no apparent constructive purpose, and might have driven into bankruptcy or receivership a company not prepared to stand the strain.
>
> This drove us to curtail and protect our investment in every possible manner. Wages and salaries had to be reduced. Employees were let out, etc., etc."

At another point in the questionnaire Nebraska said that the $1.50 base "placed on Superior by competition * * * continued through 1931 into 1932" and referred to subsequent circumstances as follows:[4]

> "January 28, 1932, Sugar Creek and Bonner Springs reduced their base from $1.50 to $1.25, which left only a few stations near Superior governed by the $1.50 base placed on it. On June 7, 1932 Superior was based on $1.80, and on July 18, at $2.00. Other mill bases also advanced. This continued until February 11, 1933. The base was then removed from Superior."

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[2] Com. Ex. 976-4 Q.

[3] Com. Ex. 976-4 Y.

[4] Com. Ex. 976-4 Z.

As to the effect of this change upon volume of shipments Nebraska stated that "prices were so low at $1.50 that we refused to solicit much business, even passed up tonnage that was offered to us"; as to the effect on sales territory: "eventually it would have curtailed sales territory materially. We took care of friends and obligations only." There were "no advantages" to the company from the change and there were "certainly ruinous disadvantages" (Com. Ex. 976-4 Z).

Asked to explain the circumstances leading to the change, Nebraska said:

> "The market was demoralized. Tonnage was getting unbalanced. Each was accusing the others of contributing or even causing the condition. Price war was the result." (Com. Ex. 976-4 Z)

At still another point in its Burns and Clark questionnaire answer respecting this matter, Nebraska stated that the mill base at Superior was withdrawn on February 11, 1933 "by competition who had established the base" and that "other competition followed."[5]

The effect of returning the Superior mill to a non-base mill status was stated by Nebraska as follows:

> "This had no effect on volume. In fact we know of no instance where the *method* of making prices had effected volume, so long as the prices were those being quoted by competition. Our sales territory was not effected. However, we did begin to take an interest in tonnage in more remote parts of our regular territory since the mill nets had become more attractive. It gave us revenues that made it possible to increase salaries and spend money otherwise."

The circumstances leading to the change, were said to be:

> "More favorable conditions in the market led competition to believe that we should have the privilege

[5] Com. Ex. 976-5 A.

of deciding whether or not a base was to be established at Superior. We established no base. Competition followed our method."[6]

Although the foregoing questionnaire answer of Nebraska stated that Lehigh had "imposed" this base, in a letter dated April 25, 1931, shortly after the change occurred, Charles Boettcher, President of the Ideal group of companies which includes Nebraska, attributed the base at Superior to action of Monarch. Writing H. F. Wulf, President of Monarch, he said:

> "While in Omaha yesterday, I found that you had placed a base on our Nebraska mill, and you may imagine my surprise to find you had done a thing like that. Mr. Wulf, you may have a reason for all this, and no doubt you have, and I will appreciate it if you will kindly tell me whether the fight you are making is on account of some personal feeling against me, or some of our people, or on general account. I would be glad to have you tell me if you will, as I may be able to straighten it out.
>
> Mr. Wulf, if you had hired a man to stab me in the back, or burned our plant, I wouldn't be more surprised than I am at what you have done. How one business man can do such a thing to another, in another State, is something I can't understand. Perhaps I am too old-fashioned and not accustomed to dealings of this kind.
>
> The base you have placed on the Nebraska Mill is not in good faith because it is impossible for you to continue long in business at such a price. Therefore, I cannot take such action on your part as other

[6] Com. Ex. 976-5 A.

Nebraska recognized an apparent inconsistency between this reply and its earlier statement respecting the effect of the Superior mill base, but stated that this last answer "refers to a normal situation. The conditions reported above were abnormal, brought on by the industry itself when some of its members were not acting rationally, perhaps. Such a condition would effect a change of territory possibly, regardless of whether there were a base or no base." (Com. Ex. 976-4 Z)

than a deliberate attempt to ruin our business. It is too plain to pass unnoticed.'"[7]

On April 27, 1931, Wulf replied as follows:

"Note your letter of the 25th carefully and am indeed surprised at your remarks, knowing what the two Nebraska mills have been doing in corralling all the major work on the Nebraska recent lettings, which leaves a doubt in my mind that the price in Nebraska is to the level of prices quoted the pet or favored contractors prior to the letting.

You may rest assured that I have the highest regard for your ability as a successful Merchandiser and Business man but am at a loss to know how you can hope to maintain price conditions and practice such under handed TACTICS.

No one deplores the present situation in our *former* prosperous industry more than I, which should all have been averted, and no one believes in constructive co-operation and fair dealings more than I do and shall be glad to confer with you in person at any place or any time that may suit your convenience and know of no better time and place than in New York City on May 12th."[8]

On May 1, Boettcher again wrote to Wulf, as follows:

"I returned from Nebraska this morning where I attended the letting yesterday, and for your information wish to state that we did not take any contracts of any kind whatsoever. We did not quote a price to anybody, as the prices are less than we can afford to sell cement for.

Our stockholders would not allow me to sell any cement for sixty cents a barrel, so we were out of it."[9]

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[7] Com. Ex. 2241.

[8] Com. Ex. 2242.

[9] Com. Ex. 2243.

Wulf answered this letter on May 4, 1931:

> "I note from your letter of May 1st that you personally attended the Nebraska State letting of the 30th and took none of the business for the reason that your Stockholders will not permit you to sell cement for sixty cents per barrel.
>
> The market price, that is $1.50 Iola, Mason City, Louisville or Superior would have netted you from 82¢ to $1.00 per barrel on the various projects and unless your Company felt obligated to make the customary concession do not account for the sixty cent net."[10]

Writing Sunderland of Ash Grove in the same connection on May 6, Boettcher said he had found a statute in Nebraska that "does not allow things to be done like Mr. Wulf had done in Nebraska", and that he had written Wulf "letting him know that I would bring a suit to test the case in Court."[11]

When Nebraska attributed its Superior base to the Lehigh Company, Professor Burns wrote to J. S. Young, President of Lehigh, calling his attention to that fact (Com. Ex. 913-3 Q-3 R). On October 30, 1935, Young responded explaining Lehigh's position with respect to this complaint and others generally (see pp. 493-495, *supra*). With respect to the Superior base, he said (Com. Ex. 97[redacted]o):

> "On April 23, 1931, Lehigh issued quotations throughout Nebraska, using, among other bases, $1.00 at Superior, Nebraska. Our justification for including a base of $1.00 at Superior in calculating delivered prices was the fact that the Monarch Portland Cement Company on April 20, 1931, had made effective by broadcast quotations to the trade a price based upon $1.00 at Superior. In other words, Lehigh's quotations of April 23 merely met the prices that had already become effective throughout the Nebraska market."

[10] Com. Ex. 2244.

[11] Com. Ex. 2246. See also Boettcher's correspondence regarding the base at Ada, Oklahoma, pp. 511 *et seq.*, *infra*.

Lehigh's Vice President Bowen, testified at length concerning the action taken by Lehigh in quoting prices reflecting bases at what had formally been non-base mills. (Tr. 26896 *et seq.* His testimony is digested in some detail at pp. 495-500, *supra*.)

c. Ada and Dewey, Oklahoma

Oklahoma operates two manufacturing plants at Ada, Oklahoma, and Dewey operates a mill at Dewey, Oklahoma.[1] Royal, F.T.C. Attorney, testified that he had an interview with Tyler, President of Dewey, in October 1931 at Kansas City with reference to the establishment of basing points at these mills[2]. Royal testified:

> "* * * I inquired of him about the establishing of bases at various points in his mills selling territory. He told me of the Lehigh establishing a base at Dewey and Ada, Oklahoma in connection with the Oklahoma bids of some time in April, 1931, but he said these were staggered bids, that is, that they did not use Ada and Dewey as a base in all the destinations the Lehigh bid on, but their bids were substantially lower than the Iola base which had governed up to that time, amounting to a Dewey or Ada base of $1.00, and in some cases $1.01 or $1.02 or $1.03. (Tr. 12512)
>
> * * *
>
> A. I asked Mr. Tyler about the practice of one mill establishing a base upon a competing mill and he said it is quite often the case that a mill has had set a base on a town where there existed a competing mill, and without the mill establishing the basing point at the competing mill receiving any benefit therefrom by securing any larger volume of sales whatever." (Tr. 12513)

Dewey in answering the Burns & Clark Questionnaire did not ascribe the change in status of its Dewey, Oklahoma

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[1] Fdgs., Par. 1, Subd. r, 2y.

[2] (C) Tr. 12511-13.

mill from non-base to base to the action of any other company.[3] Tyler, Dewey President, testified that the Dewey base "was put there" by his company and that no other company "ever put in a base price" at his mill.[4] He explained the "cause" of the Dewey base in "1931 or 1932 perhaps" as follows:

> "A. At the time that we established this maximum net at Dewey, Oklahoma, the prices were so terribly demoralized in all directions that although—considering the way freight rates apply to the Dewey plant we only serve a very small area. We felt that we wanted to make the price just as low or lower there so that we wouldn't create sort of a little oasis, so to speak, for other companies to try to get business.
>
> Q. You mean you wanted to put it so low that other companies couldn't afford to come into that territory? A. Not exactly that. We didn't want to have this very small area with a very small consumption of cement—that we didn't want to have some little spot there that would be attractive to the other fellow because everybody, literally speaking, had a war on prices." (Tr. 14278)

R. W. Moore, Vice President of Dewey, said Dewey's mill became a base about March 1933 and that Com. Ex. 976-12 K, Dewey's Burns & Clark Questionnaire Answer which reported the change in 1932, was not "the document at all that we filled out * * * The whole thing does not look like it came from our office in this form".[5] He denied that the Dewey base "was put in by a competitor" and asserted that Dewey put in the base at Dewey before any other company used it as a base.[6]

Dewey established this base because some of its competitors were shipping into its nearby territory heavily and

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[3] Com. Ex. 976-11 J.

[4] (C) Tr. 14277-78.

[5] (R) Tr. 47158, 47160-61, 47165-68.

[6] (R) Tr. 47168-69.

Dewey had the idea that if it reduced its prices in that territory it might get some of the business. However, it did not.[7] At that time the price was $1.75 cloth f.o.b. Dewey and it went down to $1.50 just before 1934.[8]

Moore was asked about this on cross-examination:

> "Q. Well, couldn't you have reduced the price right at those particular destinations without putting in a base that made a maximum for all your business out of Dewey? A. Well, I presume we could have. We were free to do it we——
>
> Q. What were your reasons for putting in a base then rather than merely meeting the competition of mills that were shipping into Dewey's local territory? A. We thought that was the way to achieve the ends we aimed to achieve." (Tr. 47174)

Referring to the Ada, Oklahoma mill of the Oklahoma company, Sunderland, President of Ash Grove, wrote Professor Burns on July 2, 1935[9] that a price was established there effective April 14, 1931, citing this as an instance

> "• • • where we learned that a competitor, whose base price had been forcibly reduced, *did not intend* to make any such reduction, but *nevertheless did so* to meet the reduced price arbitrarily established by a competitor."

The Oklahoma company did not answer the Burns & Clark Questionnaire.

Rader, Vice President of Lehigh, testified that Lehigh had been "accused" of putting in basing point prices at mills where Lehigh itself did not have a base, but added:

> "• • • I don't know whether we believe we did or not. We have met prices that we found by other companies.

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[7] Moore, R. W., Vice President, Dewey (R) Tr. 47169, 47174.

[8] Id., Tr. 47169-70.

[9] Com. Ex. 971-14 Z-15 A.

Q. Do you mean by that that if some mill at a point where you did not have a mill cut the price, that you have sometimes put in a base at their point of production? A. I believe that has been done by us tracing that back and feeling that they were using that generally, and we would use it.

Q. You wouldn't do it unless you found them using it generally? A. I wouldn't think we did." (Tr. 12993-94)

He said he believed Lehigh had done this at Ada, Oklahoma.[10]

Sunderland, President of Ash Grove, who, as already noted, said Lehigh had "imposed" a base on his Louisville, Nebraska mill[11] had some correspondence with Boettcher, President of Oklahoma, at about this time about what he termed "this cement market debacle". On April 18, 1931 he wrote:[12]

[Italicized part quoted in Fdgs. Par. Ten (e)]

"My present conviction is that the five or six interests which apparently observed the published market at the recent Oklahoma bidding, should get together as soon as possible and organize, for mutual protection and to map out a constructive program. Until at least a few of us can present a solid front and have something constructive to offer, I feel any individual efforts to try to placate our belligerent Eastern friends would be futile at this time and might longer delay market recovery.

"On account of commitments I cannot readily change; I shall be away the greater part of next week, but if it is agreeable to you and your mind reacts favorably to the above suggestion I shall be very glad to try and arrange such a conference at Kansas City at the earliest date after my return as may suit your convenience."

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[10] (C) Tr. 12998.

[11] See p. 490, *supra*.

[12] Com. Ex. 2245.

> "I believe by intelligent cooperation we can, without violation of law, at once protect ourselves against each other, minimize the losses the enemy seeks to inflict, and enhance our influence in shaping such reconstruction moves as are bound to come in some form sooner or later; and perhaps be instrumental in hastening the end of present demoralized conditions, which to my mind are as senseless as they are serious."

On May 6, 1931, Boettcher wrote to Sunderland acknowledging a letter of May 5th "regarding the trip to New York."[13] Explaining that his health would not permit his going, he added:

> "I have requested Mr. Nichols to go down and hope that the meeting will be satisfactory to everybody. I think all the cement people should do everything they can to bring a better feeling into the industry.
>
> "Of course, as long as some of the people take it upon themselves to place a base price on somebody else's mill, we will never get any place and it is a great mistake to start anything like that. I find that there is a statute in the State of Nebraska, and maybe in other states, that does not allow things to be done like Mr. Wulf has done in Nebraska. I wrote him a line a few days ago letting him know that I would bring suit to test the case in court."[14]

Sunderland answered on May 8th and said among other things:

> "I feel as you express, to wit., that the cement interests should do everything they can to create a better feeling, for friendly cooperation cannot flow out of feelings of personal ill-will and bitterness.

[13] Com. Ex. 2246.

[14] Id. (This refers to the base at Nebraska's Superior mill. See p. 504, *supra*.)

"Hoping * * * that I may be able to see you soon after my return from the New York meeting, * * *."[15]

On May 28, 1931, Boettcher wrote Powell, President of Southwestern, in part:

[Italicized part quoted in Fdgs. Par. Ten (e)]

"* * * *I wish you would give me some idea as to what success your people had at the New York Meeting, and whether anything will be done in the near future. As you know, we have this $1.00 base at Ada and also at the Nebraska plant and I am extremely anxious to have this taken off if it can be done, so if you people have a meeting in the near future, I would like to attend it, or help all I can. Of course, I don't want to go to New York, but if the meeting is in Chicago or this side of Chicago, I will be glad to attend, if you want me to.* * *."[16]

On June 5, 1931, Boettcher wrote to B. H. Rader, Vice President of Lehigh, stating:

[Italicized part quoted in Fdgs. Par. Ten (e)]

"As I wired you May 29, I went to Kansas City last Monday and returned here Wednesday. We had a pleasant meeting in Kansas City; there were only a few present and everything went off nicely, but, at the same time, I can't see that we accomplished much. No doubt, you heard all about it from Mr. Norcross,[17] as he represented the committee of twelve appointed to see the various people. We have agreed to join the Association, under certain conditions which could easily be complied with.

"When I saw you in Chicago, you said you would do what you could to take off the base at our Ada plant. I am very anxious, Mr. Rader, to have that done and I believe, with your help, it could be done.

[15] Com. Ex. 2247.

[16] Com. Ex. 2248.

[17] Hiram Norcross was an officer of Missouri at this time (C) Tr. 14390.

Will you not kindly advise what you can do for me and when I may look for a change in conditions, that is, when we will have the privilege of putting our own base on our mill. This is not asking a great deal, as your putting a base on our mill does not help you at all and it injures us very much. Will you not please see what you can do for us, and I certainly will be glad to return the compliment."[18]

An unsigned, unaddressed memo dated June 12, 1931, selected from the Ideal files by an F.T.C. investigator, also refers to the Ada base.[19] It reads:

"I have your memorandum regarding our Ada plant. I know these are not good times to make any change, but I would like to have you take off the base on our plant, because this would not raise the price for anyone, nor would it injure anyone; in fact, it would be a good thing for most of them. I wish you would take this up with Colonel Young and request that, as a special favor, it be granted, and I would like to hear from you at your earliest convenience advising that you will do so. Please say to the Colonel that I helped you more than I am asking you to help us."

On August 13, 1931, Sunderland wrote Boettcher:

[Italicized part quoted in Fdgs. Par. Ten (e)]

"After leaving you today I tried to reach Hiram[20] *by phone but was unsuccessful, and therefore sent him a personal note, copy herewith, so he could shape his plans accordingly.*

"I think it leaves the matter in excellent shape since it will allow Hiram time to develop the phases of the situation which he was delegated to try and get straightened out as far as our districts are concerned. In the meantime none of us will be paying

[18] Com. Ex. 2249.

[19] Com. Ex. 2250.

[20] Sunderland said this referred to Hiram Norcross (C) Tr. 14390.

additional dues which, we all agree with you, none of us should pay unless, and until, the principle is recognized that each company has the exclusive right to determine its own maximum selling (base) price at its own mill.

"Hoping to see you in Chicago next week. * * *"[21]

A copy of the note referred to in the above letter, addressed to Hiram Norcross, reads in part:[22]

[Italicized part quoted in Fdgs. Par. Ten (e)]

"After you left I had an opportunity to further discuss the situation with Mr. Boettcher, who authorized me to say his companies would join the others represented today in making application to join the P.C.A., effective January 1, 1932, without attaching to the application any conditions, but with the understanding nevertheless (among ourselves only) that if matters mentioned are not in the way of being straightened out before the annual meeting in November (when the amendments are to be submitted), the applications may be withdrawn."

R. W. Moore, Vice President of Dewey testified that the Dewey base at Ada remained effective until some time in 1934,[23] but there is some conflict in the record. Com. Ex. 1121 B shows the base increased to $1.25 on May 31, 1932, and Com. Ex. 2387 a further increase to $1.50 on July 30, 1932. Ash Grove reported to Burns & Clark that Ada became a non-base mill on August 4, 1932[24] but other exhibits give the date as July 7, 1933.[25]

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[21] Com. Ex. 2257.

[22] Com. Ex. 2258.

[23] (R) Tr. 47160-61, 47168.

[24] Com. Ex. 976-6Z.

[25] Resp. Ex. 2506, Com. Exs. 1185, 2387, 967-16 o.

d. Rapid City, South Dakota

In 1924, the State of South Dakota built a cement plant at Rapid City, South Dakota. The plant began to operate in about March, 1925.[1] The company is not a respondent.

In a letter to J. S. Young, President of Lehigh, on October 5, 1935 Professor Burns referred to comments in answer to the questionnaire regarding policies of Lehigh which affected the South Dakota plant as follows:

> "* * * several mills commented on the price changes at Mason City on August 23, 1929 and on January 16, 1930. It appeared that the base price at both Mason City and Rapid City was reduced by 20¢ in August 1929 and that in March 1931 Mason City was restricting the low base price which it then had established, to points outside South Dakota. Although there was no indication that it was the Lehigh Company which reduced the base price at Rapid City and which introduced the policy of restricting the Mason City base price in March 1931, I should be very glad to have your comments on the competitive situation which gave rise to these price changes. There were no comments, for instance, in the questionnaire from your Mason City mill as to the effect of the establishment of the Rapid City plant on the market territory of your mill, nor were there any comments in answer to Question 20 as to the restriction of your base price geographically."[2]

In response to this letter Young wrote Burns that prior to the advent of the South Dakota mill Lehigh had enjoyed approximately one-third of the total cement business in that state but that thereafter Lehigh's shipments had declined precipitously. A tabulation of Lehigh shipments to South Dakota showed a drop from 176,000 barrels in 1925

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[1] Hartley, Sales Manager, South Dakota State Cement Plant (C) Tr. 12741.
Resp. Ex. 3765 B: List of Portland Cement plants.

[2] Com. Ex. 913-3 Q-R.

to 825 barrels in the year 1932.[3] Young stated further, and there was other evidence to the same effect,[4] that contractors in South Dakota had to buy the State brand, that dealers accordingly did not handle brands that were not extensively used by contractors and that buyers were subjected to political pressure.[5] Hartley, Sales Manager of the South Dakota plant, testified that while cement at other mills was available for South Dakota State work it was not used if he could help it and he had always been able to help it.[6] Young, in his letter to Burns, stated further that

> "Notwithstanding the political barriers that were raised * * * the base that was established at Rapid City shortly after the completion of the state-owned plant was recognized by all companies which had formerly enjoyed a portion of South Dakota tonnage."[7]

Other evidence shows that the Rapid City mill was originally a non-base mill and determined its prices "on the nearest mill that was a basing point * * * Mason City, Iowa."[8]

In 1926 Rapid City became a base when Lehigh quoted prices in the South Dakota area using the same base figure

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[3] Com. Ex. 971-23 Q-R: Letter dated October 30, 1935, Young, President of Lehigh to Burns.

[4] Bowen, Vice President, Lehigh (R) Tr. 26905.
Hartley, Sales Manager, South Dakota State Cement Plant (C) Tr. 12747.

[5] Com. Ex. 971-23 Q-R.

[6] Tr. 12747.
Northwestern States stated it had "wholly withdrawn from State of South Dakota because political situation made it expedient for trade to favor state-owned plant." (Com. Ex. 975-2 G, Burns & Clark Questionnaire)

[7] Com. Ex. 971-23 R, *supra*.

[8] Hartley, *supra*, Tr. 12743-44.

at Rapid City that Lehigh was using at its Mason City, Iowa plant. The effect of this base was to lower South Dakota's return at Rapid City between 60¢ and 70¢ a barrel because the South Dakota plant could no longer take advantage of the 30¢ or 35¢ freight rate from the Mason City base to the Rapid City area.[9]

Bowen, Vice President of Lehigh, testified that in each instance where Lehigh used a base at the mill of a competitor, it was for the purpose of publicly meeting delivered prices quoted by that competitor.[10] Prior to the time that Lehigh began quoting prices from a Rapid City base, he testified that Lehigh found "a great many prices made by the Rapid City plant lower than its public quotations" which resulted in a loss of business to Lehigh[11] and that the base was put in because Lehigh wanted to protect itself to some measure against the unfair competition to which it was subjected. He added:

> "We were considering only the conditions that were facing us. We weren't theorizing, but we were dealing with actual situations: Whether the plants that were making the price concessions of the kind I described considered themselves as basing-point mills or non-basing-point mills, we didn't know. All we knew was we had competition to meet; that we had to move fast; that we had to make our quotations openly; that we wanted to treat all our customers alike.
>
> The plants may, for all I know, have considered themselves basing-point mills and partly non-basing-point mills. At least their quotations showed definitely that they were no longer what we considered non-basing-point mills." (Tr. 26907-08)

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[9] Hartley, Sales Manager, South Dakota State Cement Plant (C) Tr. 12747-50.

[10] See pp. 495-500, *supra;* Bowen, Vice President, Lehigh (R) Tr. 26897-98.

[11] (R) Tr. 26905-06.

Asked what the result was after Lehigh had quoted prices based on competitors' mills, Bowen testified:

> "After that happened there was a gradual change in the situation * * * prior to that action competitors were able to make prices in certain territories secretly * * * but with our quotations made publicly those competitors very quickly found that they could no longer get business at varying prices but must take the price covered by our published quotations.
>
> As time went on we found that the secret price concessions gradually began to clear up and we did begin to get a considerable volume of business at our published prices."[12]

The result in South Dakota, he stated, was to enable Lehigh to hold some of its business.[13]

Hartley testified that there never was a time when the Rapid City base was below that of other bases in the area.[14] In his letter dated October 30, 1935 to Professor Burns, however, Young, of Lehigh, wrote as follows:

> "* * * The history of South Dakota cement prices does not disclose one single occasion where the Rapid City plant attempted to raise its base during the period of falling prices which ended during the summer of 1932. It is rather significant to note that when Lehigh raised its Mason City base from $1.00 to $1.25 on July 18, 1932, the South Dakota Cement Commission did not follow with a corresponding increase in the Rapid City base, in spite of the fact that these two bases had been maintained at approximately the same levels since 1929. It was not until late in September of 1932 that we discovered 'Dacotah' quotations in the field based upon $1.25 Rapid City and promptly thereafter, namely October 4, we issued new quotations in the area affected by

[12] (R) Tr. 26903-04.

[13] (R) Tr. 26907.

[14] (C) Tr. 12753-54.

the Rapid City increase giving full recognition to the higher base." (Com. Ex. 971-23 R-S)

Another increase in the Mason City base which was not reflected at the South Dakota plant is referred to in an inter-office letter of Monolith Midwest dated January 22, 1930 written by L. R. Nelson from the Denver office to R. L. Vance, Vice President of the Company, Los Angeles as follows:

[Italicized part quoted in Fdgs. Par. Ten (b)]

"Yesterday morning Mr. Morse of the Colorado Portland Cement Co. phoned and said that Mason City base was up 25¢, that he had heard of no other changes. Immediately on receipt of this information I telephoned to Mr. Hartley and he told me that he had quotations out raising his mill base 25¢ at points where it applied in Wyoming, Nebraska, North and South Dakota, but that he was having difficulty in the eastern part of his territory and he did not know whether or not he would stand by these quotations. It all depended on whether or not the other manufacturers were going to follow. I assured him that we would follow in Wyoming but that we could not speak for the rest of the industry, although I would take the matter up with the Colorado Portland Cement Co. This I did and Mr. Morse assured me that he would raise his prices in Wyoming 25¢, wherever the Rapid City base governed.

"I telephoned this information to Mr. Hartley and he said that he would let his quotations stand but he wanted the Colorado Portland Cement Co., to commit themselves to him and asked me to have Mr. Warner telephone him. This I did and late in the afternoon Mr. Morse called me and said that he had been talking to Chicago and had learned from them (I suppose he meant Universal) that Rapid City had quotations out of the new figure but that they accepted business at the old price for shipment during April. Morse said that in view of this he was reluctant to change his quotations until he was sure that Rapid City would stay in line. This morning

Mr. Warner telephoned me and said that he was leaving tonight for Chicago to attend a meeting and endeavor to straighten up the situation."

"Mr. Warner * * * asked if we would observe the new price, and I assured him we would.

"There has been no change as yet from any of the Kansas mills but it is expected very shortly, depending probably on the outcome of the meeting in Chicago. * * *"[15]

In another letter written by Nelson to Vance on January 30, he said:

[Italicized part quoted in Fdgs. Par. Ten (b)]

"This morning Mr. Warner of Colorado Portland Cement Co., advised me by phone that the gas belt mills had increased their base 20¢ per barrel. This means a general increase in prices in practically all of our shipping territory. The basing point will move from Iola to Kansas City. As yet there has been no changes reported from either Sugar Creek or Bonner Springs so we are basing our new prices on $1.55 Kansas City.

"Warren had just returned from Chicago and he says that the powers in the East are inclined to let the Rapid City base stay where it is; in other words, they will not increase price where Rapid City controls until they have some definite assurance from Rapid City that they will abide by it. Warner says that they put out quotations on a base of $1.65, their mill, and then were willing to accept business for delivery during April. As long as this condition is in effect, it means there will be no change in prices at any Wyoming points controlled by Rapid City. Warner further said that the industry as a whole hesitates to take this matter up with the South Dakota officials because their experience in the past has been that the Governor of South Dakota broadcasts anything that is told to the officials of the cement plant and makes the statement that the cement trusts are trying to control their mill."

[15] Com. Ex. 1202 G-H.

"The rumor is that the Kansas City base also will be increased. * * *"[16]

Mr. Vance was called as a witness by the Commission to identify these letters. He testified that Nelson, the author of them was a salesman who is no longer with the company,[17] that Nelson had no authority "but what he assumed" and that the letters do not represent the facts as he knew them at the time; but "gossip and rumors," which "were not taken notice of by the management of the company".[18] Brooke, Vice President of Monarch, which sells in the Kansas City area testified that he could not recall any meeting in Chicago in 1930 at which price bases were discussed and that that subject was never discussed at any meeting of cement executives that he attended. He said further that to his knowledge the mill base at any plant did not depend on the outcome of any meeting.[19]

e. Fultonham and Osborn, Ohio.

Pittsburgh owns a mill at East Fultonham, Ohio, which started operating in 1924.[1] Southwestern operates a plant at Osborn, Ohio, which began to operate in 1925.[2] Wabash has operated a plant at Osborn since 1926.[3] Each of these mills were operated as non-basing point mills except

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[16] Com. Ex. 1202 K.

[17] (C) Tr. 9341.

[18] (C) Tr. 9346.

[19] (R) Tr. 42333.

[1] Resp. Ex. 3765: List of New Portland Cement plants from 1911-1937.
Letzkus, Sales Manager, Pittsburgh (R) Tr. 37682.

[2] Warren, G. E., Vice President, Southwestern (R) Tr. 28707.

[3] Resp. Ex. 3765, *supra*.

for limited periods in connection with trucking during 1929 and 1930.[4]

On May 16, 1931, Alpha established a base of 96¢ per barrel at its Ironton, Ohio mill and simultaneously therewith quoted prices also based upon the same base figure at Fultonham and Osborn.[5] Fultonham is 138 miles north of Ironton,[6] and Osborn is 176½ miles northwest of Ironton.[7]

In response to the Burns & Clark Questionnaire, Southwestern ascribed the base at Osborn to Alpha, but offered no explanation for Alpha's action, stating: "competitor's intentions unknown", but denied that it had already quoted delivered prices in the area suggested that a base price was in operation.[8] Pittsburgh in its Burns & Clark Questionnaire answer stated that "we never put in the base at our mill; neither did we take it out" and supplemented this with the further explanation that "the first we knew of a base at our plant was when some of our field men picked up quotations sent out by competitive mills that figured back to $1.06 at our plant."[9] Wabash did not submit any answer to the Burns & Clark Questionnaire.

Referring to the bases at Fultonham and Osborn, Diamond, replying to the Burns & Clark Questionnaire, stated

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[4] Com. Ex. 3318: Interoffice price memo 8/6/30, Stone, Vice President, Universal Atlas to Salesmen.
Com. Ex. 1124 A-B: Interoffice memo 7/28/30, Pierson, Vice President, Lone Star to Koch, Vice President.

[5] Com. Ex. 970-15 X, Y, Z: Alpha answer to Burns-Clark Questionnaire.
Com. Ex. 970-3 A, 3 N: Southwestern answer to Burns-Clark Questionnaire.
Coogan, Vice President, Alpha (R) Tr. 23289-91, 23292-94.

[6] Com. Ex. 969-1 P: Pittsburgh answer to Burns-Clark Questionnaire.

[7] Com. Ex. 970-2 T: Southwestern answer to Burns-Clark Questionnaire.

[8] Com. Ex. 970-3 A, 3 M.

[9] Com. Exs. 969-1 W; 971-13 H.

that "bases were presumably installed by competitors who objected to marketing methods of companies located at those points."[10]

Dankel, Assistant Sales Manager of Bessemer, testified that Southwestern at Osborn and Pittsburgh, among others, in 1931 had made prices deviating from and lower than the prices that Bessemer was quoting to customers and that Bessemer's prices were the same as those of other competitors in the market.[11]

Alpha explained its action in Ohio to Professor Burns in a letter from its Vice President Coogan dated June 4, 1935, as follows:[12]

> "On January 31st, 1931 this Company established a flat arbitrary price for the entire State of Ohio of $1.65 per barrel, including 5 cents for dealer service payment. Our reason for this action was the fact that the prices and competitive situation in the State of Ohio were in a very chaotic state. All kinds of prices were being made by different manufacturers located within and those located outside of State. It seemed that this method was the only possible way for us to meet existing competition. This price was continued until March 26th, 1931, when it was reduced to $1.45 in cloth and on April 1st, 1931 when we eliminated dealer service payment of 5 cents per barrel, the price was further reduced to $1.40 per barrel. This did not help the competitive situation and this plan was abandoned on May 16th, 1931, at which time we established base prices at our mill at Ironton, Ohio, and also at the mills located at Osborn and Fultonham, Ohio.. At the two latter points there had formerly been no base price. The base prices were established at these points because as nearly as we could figure the mills located there were using about this figure in arriving at destination prices which they were quoting. Furthermore, this

[10] Com. Ex. 970-5 B.

[11] (C) Tr. 11342-45.

[12] Com. Ex. 970-15 Y-Z.

same base price of 96 cents net at the mill was established at some of the northern mills and we felt that the same price should be established for the mills in southern Ohio.

"The Company making the complaint is, of course, entirely correct in the statement that this reduction reduced the net accrued to the mills shipping into that territory. Certainly it reduced our own net price as well as other mills shipping into that territory."

Coogan testified to the same effect[13] and said that Alpha determined on the 96¢ base because:

> "As near as I can recall the figure that was about the price which we felt the mills located at that point were using in quoting on some business which we were both trying to get, and we decided to use that same figure; that was as near as we could get to the figure at that time." (Tr. 23292)

Coogan testified further that Alpha used the same base at its own mill at Ironton for all of its customers.[14]

Alpha stopped using the 96¢ base at Fultonham and Osborn in December 1931 because, Coogan testified, "we found we were not getting any more business than we previously had been getting".[15] Alpha discontinued the effect of these bases by issuing quotations based on its own mill at Ironton "to see what our competitors located at these other points would do".[16] The result, Coogan testified, was that the mills at Fultonham and Osborn issued quotations following Alpha quotations based on Ironton.[17]

Coogan testified that Alpha's activity in Ohio "was not a retaliatory measure in any way. It was simply another effort to find out a way to meet competition which was ex-

[13] (R) Tr. 23289-91.

[14] (R) Tr. 23293-94.

[15] (R) Tr. 23294-95.

[16] (R) Tr. 23295-96.

[17] (R) Tr. 23296.

isting according to all the reports which we got from the field[12]".[18]

f. Painesville, Ohio

Standard operates a plant at Painesville near Lake Erie in the northeastern section of Ohio. It began operations in 1925.[1]

Dankel, Sales Manager of Bessemer, testified that he thought Lehigh established a base of $1.06 at Painesville in 1931 (Tr. 11347-48). Diamond in its Burns & Clark Questionnaire answer also attributed a Painesville base to "competitors who objected to marketing methods" of the company located at that point.[2] Standard did not answer the questionnaire. Lehigh's Vice President Bowen stated that Painesville was one of the points from which Lehigh calculated prices.[3]

Lehigh's action with respect to the use of base figures at competitors' mills was explained at length by its Vice President Bowen and in a letter written by J. S. Young, President of the company to Professor Burns. These are set forth, *supra,* at pages 493-500.

Bowen was cross examined as follows as to the Painesville base:

> "Q. You said you never made a base at one of these other mills lower than your own base. Isn't it a fact that you made the Painesville, Ohio, base $1.06 in May, 1931, while your own Buffalo base was continued at $1.21? A. I wouldn't call Painesville and Buffalo adjacent bases.
>
> Q. Isn't cement sold in common territory from both Buffalo and Painesville? A. In some measure.

[18] Coogan, Vice President, Alpha (R) Tr. 23296.

[1] Resp. Ex. 3765: List of New Portland Cement plants from 1911-1937.

[2] Com. Ex. 970-5.B.

[3] (R) Tr. 26904-05.

Q. Now, will you answer my question whether or not the Painesville base wasn't put in by you in May, 1931, at $1.06, and you kept your Buffalo base at $1.21? A. Mr. Wooden, I would suggest that the comparison that you are making might better be made between the Cleveland and Painesville bases, they being adjacent bases.

Q. You sell cement from Cleveland that comes from Buffalo, don't you? A. That is correct, but they are separate and distinct bases.

Q. Well, can you answer the question?

• • •

A. If the record shows that those respective base figures existed, I will say that we did, and I see nothing inconsistent in that with my former statement, as I do not consider Buffalo and Painesville as adjacent bases in the limits of what I have previously said.'"[4]

g. Kosmosdale, Kentucky and Speed, Indiana

The respondent Kosmos and the non-respondent Louisville operate mills in the same area at Kosmosdale, Kentucky and Speed, Indiana, respectively. The former is 86 miles and the latter 78 miles south of the Lehigh mill at Mitchell, Indiana.[1] In May 1932 Lehigh sent out quotations in the sales territory area of Mitchell, Kosmosdale and Speed which in addition to reflecting a base price at the Mitchell mill also reflected bases at Kosmosdale and Speed.[2]

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[4] (R) Tr. 27282-83.

[1] Com. Exs. 970-1 R, 975-19 B: Burns and Clark Questionnaire answers.
Horner, President, Kosmos (R) Tr. 36835.
Hill, Vice President, Louisville Cement Co. (C) Tr. 13209.

[2] Hill, *supra* (C) Tr. 13210, Com. Ex. 975-18 T-U, 19 I-J: Answer to Burns-Clark Questionnaire.
Horner, *supra* (C) Tr. 12401, Com. Ex. 970-1 i, 1 J, Com. Ex. 971-23 N-O: Answer to Burns-Clark Questionnaire.

In answering the Burns and Clark Questionnaire, Kosmos offered the following explanation for the action of Lehigh respecting Kosmosdale:

> "During the Spring of 1932 we found that our prices, particularly on the larger road contracts, were high on comparison with another company's. In talking with contractors we found that another company was quoting approximately 20 cents per barrel less than their written quotations. Shortly after this the Kentucky Highway Department took bids on several large road jobs in West Kentucky, asking the contractor to bid both supplying cement and with the State furnishing the cement. The State at the same time took bids on the cement required for work. We felt it best to quote both the State and the contractor at the real prices which we had learned were being quoted and which were approximately 20 cents per barrel under the general market quotations of that time.
>
> These bids were opened in public, and shortly after, another company sent out quotations based on our mill on approximately what we netted at our mill on quotations we had made to the State."[3]

Kosmos stated that it had already quoted delivered prices in some parts of the area which suggested that a base price was already in operation.[4]

Louisville offered no explanation for Lehigh's action at its mill but stated that "We may have sold specific jobs at cut prices which may have led Lehigh to believe we were establishing a base. There had been no general quotations that could have given such an impression."[5]

Hill testified that this base caused no particular effect on Louisville business, except that it created a very low base; that Louisville had been taking business at mill nets

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[3] Com. Ex. 971-1 Q.

[4] Id.

[5] Com. Ex. 975-18 T-U, 19 I-J.

as low as the new mill base that Lehigh had established and that "I had cut some contract prices that would indicate that I was willing to take that figure at my plant."[6] Hill was examined further as follows:

> "Q. When you cut your price in Indianapolis, the Lehigh Company could have found out—they could have found out at what price you were selling there; could they not? A. They did find it out apparently.
>
> Q. Yes. And it was then that Lehigh sent out these quotations you have described to meet your competition? A. I presume so.
>
> Q. Yes. That was what you meant and all that you meant when you said the Lehigh Company had imposed a base on your mill; is that correct? A. I presume they used that information to impose a base. I don't now just why—how their mind worked on that. (Tr. 13280)
>
> • • •
>
> Q. • • • And what happened was that your competitor by putting that base on your mill, as you put it, actually met that price that you had made? A. The price he made on our mill is the same net price that had been secured on the contract I sold at Indianapolis.
>
> Q. So that the effect of it was meeting your price, is that right or not? A. On that particular job, yes, sir." (Tr. 13296)

Hill pointed out that the establishment of this base at Speed reduced net earnings at the plant because it reduced Louisville's current prices everywhere, that is, it lowered the mill nets only where the Speed base was in operation.[7]

Horner, President of Kosmos, testified that the effect on Kosmos was to give the company a lower net return than it had been getting on part of its business. He explained that previously Kosmos had been taking a net re-

[6] (C) Tr. 13212.

[7] (C) Tr. 13219, 13277.

turn of less than the new base in some distant business in territory in which the price was made by another base.[8]

J. S. Young, President of Lehigh, wrote Dr. Burns on June 29, 1935, that the base price at Speed and Kosmosdale were defensive measures to meet competition and:

> "The alleged imposition by Lehigh of a base price at Speed, Indiana and Kosmosdale, Kentucky, presents the typical case of tracing lower prices in the field back to the mill of the competitor making the reduction."[9]

In a later letter dated October 30, 1935 to Dr. Burns, Young elaborated on the reasons for Lehigh's action as follows:

> "On May 11, 1932, the Kentucky State Highway Department opened bids on 89,731 barrels of cement to cover requirements for various paving contracts. Publication of the bids submitted revealed that the Kosmos Portland Cement Company with a plant at Kosmosdale, Kentucky, had reduced its prices at all of the delivery points involved in the letting approximately 20¢ per barrel. On the strength of these reductions in prices and on the assumption that these prices constituted a new lower level at which the Kosmos Company was willing to sell its product, Lehigh, in accordance with the established practice in the industry, traced back the delivered prices found in the field to Kosmosdale and arrived at a figure of 90¢ per barrel. Shortly thereafter on May 25, 1932, Lehigh issued quotations throughout the southern reaches of its Mitchell, Indiana sales area, using as one of the bases for arriving at its delivered prices 90¢ at Kosmosdale.
>
> The delivered prices made effective by Lehigh in Mitchell territory on May 25, 1932 were also predicated on a base of 90¢ at Speed, Indiana. In addition to reducing prices freely to contractors bidding on requirements for the Kentucky State Highway Department * * * the Louisville Cement Company also

[8] (C) Tr. 12403-04.

[9] Com. Ex. 971-14 U.

reduced its price about the same time on a State Highway bridge job at Indianapolis, Indiana, for which Cunningham Johnson Construction Company had the contract. The cut price on this netted 84¢ at Speed. In issuing its quotations of May 25, 1932, Lehigh was reluctant to quote on the basis of a figure as low as 84¢ and elected to attempt to meet prices in the field by accepting the same base at Speed as had been determined for Kosmosdale, namely, 90¢ per barrel."[10]

Hill testified that the base price remained in effect for two or three months.[11] Other evidence shows that Speed was discontinued as a basing point on July 18, 1932, when other cement companies sent out quotations in the territory which were not based on Speed. Louisville met these quotations and discontinued using Speed as a base. There were nearby mills used as basing mills with freight rates approximately the same as the rates from Speed.[12]

h. Spocari, Ala.

In answer to the Burns & Clark Questionnaire Lone Star stated that on December 5, 1927 it began to quote prices based on the mill at Spocari, Alabama (which it did not then own) which in effect converted that mill from a non-basing point to a basing point mill.[1] The circumstances were described in the answer of Lone Star's North Birmingham mill as follows:

[Italicized part quoted in Fdgs. Par. Ten (c)]

"Spocari producer was found to be passing to buyers, secret rebates (representing freight advantage)

[10] Com. Ex. 971-23 N-O.

[11] (C) Tr. 13216-17.

[12] Com. Ex. 975-19 M: Louisville Answer to Burns-Clark Questionnaire.

[1] Com. Ex. 975-5 U, 6 o.

deducted from open quotation calculated on a N. Birmingham base.'"[2]

They were described in the answer of Lone Star's New Orleans mill thus:

> "Quotations found in field indicated that Spocari was basing on Birmingham but were giving advantage of any rate from their mill to destination to trade in form of rebate."[3]

Hogan, President of Lone Star, testified that:

> "* * * At one time Spocari undersold Lone Star so persistently by quoting special prices that Lone Star finally quoted its whole territory on the basis of these special prices. This was in the latter part of 1927."[4]

Neylan, Assistant General Sales Manager of Lone Star, called by the Commission testified:

> "A. We found quotations in the field issued by the Warrior Cement Company, as I recall it, which indicated that they were using a price at their plant.
>
> Q. You mean that they wanted to become a base point mill? A. I don't know whether they wanted to, or not, but they did.
>
> Q. You were the one that put the base price in there, weren't you? A. I disagree with you on that. (Tr. 6684-85)
>
> * * *
>
> Q. You mean they brought it upon themselves? A. I don't care how you characterize it. They quoted their own prices. We had nothing to do with the prices they quoted, and we had to assume that those were the prices on which they were willing to sell.
>
> Q. Their prices were not the equivalent of the Birmingham base plus freight; is that what you

[2] Com. Ex. 975-5 U.

[3] Com Ex. 975-6 o.

[4] (R) Tr. 34674.

mean? A. Not necessarily Birmingham. It might be New Orleans. It might be any other place.

Examiner Norwood: Were they lower than Birmingham plus freight? (Tr. 6685)

The Witness: I do not know that in all cases that the original destination figured on Birmingham.

Examiner Norwood: Were they lower?

The Witness: Yes, sir; in all cases.

* * * *

By Mr. Wooden:

Q. You put in a base price at Spocari, didn't you? A. We made prices that we figured that they had quoted. We found prices that they had quoted.

Q. You made the base price the equivalent of what you found at some destinations; is that right?

* * *

A. All we did was meet what we considered was their price (Tr. 6687).

* * *

A. Here is a mill that was quoting certain prices. We are in contact with them. We knew what they are quoting. We are soliciting the same dealers and the same contractors. All of a sudden a change takes place and to the best of my knowledge and belief the change represented the difference in the freight rates from Spocari as against Birmingham or some other basing point. That is my recollection of it. That leads us to believe that we have a perfect right to meet that competition.

Q. Spocari took in that case the right to establish the same thing? A. They undertook to establish themselves as a base mill, yes.

Q. And to give the purchasers the same advantage? A. That's all right." (Tr. 6690-91)

On April 28, 1928, Lone Star purchased the Spocari mill. This mill was a basing point mill and it was con-

tinued as such until November 30, 1929, at which time Lone Star stopped making ordinary cement there and began the production of high early strength cement only.[5]

Under date of April 25, 1928, F. H. Powell, President of Southwestern, wrote W. H. McCortie, President of Trinity, commenting on consolidations in the cement industry as follows:

> "It is very interesting to hear of the Eastern consolidations and recent purchases of the outlaw plants by some of the larger companies. It is proven that the most effective way to cure a bad situation is to buy up the offenders. I have always understood that there was a hot-bed of bad actors through Alabama and some of the adjoining Southern states; and for a time it looked as though conditions would never adjust themselves. The demoralized market backed up and we felt it in our Osborn territory. At the time the Birmingham base was dropped to $1.45, it trimmed us out of 10¢ a barrel in our Cincinnati territory, and we felt this quite keenly as this was our home town market. We are all hoping now that the Southern situation is in good hands and that we soon can look for a more stable situation."[6]

Mr. Hogan's testimony as to the reasons for the acquisition of the Spocari mill follows:

> "• • • The Spocari mill was never an important factor in the cement business. Its methods of selling was not what led Lone Star to purchase the plant. The principal reasons, were, as stated above, its desirable location and the advantages it enjoyed in natural resources. Lone Star expected the cement business to continue prosperous, and planned to put the mill in good condition, and within a year or two, to have a very profitable investment." (Tr. 34674)

• • •

[5] Com. Ex. 975-4 X, 5 B, 5 R: Lone Star answer to Burns-Clark Questionnaire.

[6] Com. Ex. 1274 C.

The Spocari mill is located on a navigable river so that it can ship cement to the coast by water. Furthermore, it has a very soft limestone from which the cement is ground. Lone Star believed that it was possible to develop that mill into a very low cost property; and by reason of the water transportation that it could meet competition in the South which would be otherwise difficult to reach. The quarry is unique in that it is the only one in the country or is one of the few quarries where no blasting, drilling, or electric shovel work is necessary. The limestone is a soft chalk-like material, located very near the surface, so that it may be quarried by means of a cutter which slices the limestone off the quarry face, much like a sharp knife cutting through cheese.

Lone Star had just developed its high-early strength cement, Incor, and the composition of the material used at Spocari seemed especially adapted to making of Incor cement. At that time all of the Incor was being manufactured at Limedale, Indiana. After Lone Star bought the Spocari plant, it manufactured Incor there exclusively for a period of a year or two, but when the demand for cement fell off in 1930 and 1931, it closed down the mill and didn't attempt to operate it until it was reopened again in 1938." (Tr. 34672-73)

At that time (1938) Lone Star put the Spocari mill back into production because there was a big road program in Mississippi and the mill had the lowest freight over three-fourths of the state. With the road program still going on and always the possibility of a demand for cement, Lone Star could not explain itself to its stockholders if it permitted the Spocari mill to remain idle.[7]

i. Cape Girardeau, Missouri

On or about December 1, 1930 Alpha sent out delivered price quotations in the area covered by its St. Louis and

[7] Hogan, President, Lone Star (R) Tr. 34709.

Birmingham mills, using a base of $1.35 at Marquette's Cape Girardeau, Missouri, mill.[1] In answer to the Burns & Clark Questionnaire, Alpha gave as the circumstances:

> "To meet prices quoted in the St. Louis market, which netted 75¢ per bbl. by a mill located at Cape Girardeau, Mo. we put in a base price of 75¢ at Cape Girardeau, Mo., June 6, 1932."[2]

Coogan, Vice President of Alpha, wrote a memorandum to G. S. Brown, Alpha's President, on December 1, 1930, explaining the action taken respecting Marquette which reads as follows:

> "In accordance with our conversation of Saturday, I have today been in touch with our Chicago, St. Louis & Birmingham Offices and I find that the competition in the fields served by St. Louis and Birmingham that the Marquette Co. have been making very low prices, some as low as $1.26 per barrel at their mill. They put in a low price at St. Louis proper.
>
> I have instructed both St. Louis and Birmingham to send out quotations to their field meeting as nearly as they could the competition established by the Marquette Co. This competition would reduce the price at Little Rock, Ark. 32¢, Memphis 23¢, Nashville 15¢ and Mississippi from 2 to 23¢, Louisiana from nothing to 8, 10 and 13¢ per barrel. The prices which we are using would figure as follows:
>
> | | |
> |---|---|
> | Prospect Hill and Alpha | $2.05 per bbl. in cotton |
> | To points in St. Louis & St. Louis Co. | 1.95 " " " " |
> | Cape Girardeau | 1.85 " " " " |

[1] Coogan, Vice President, Alpha (R) Tr. 23287, 23289.

[2] Com. Ex. 975-4 J. The date of the incident given in this questionnaire answer is June 6, 1932. This was corrected by Mr. Coogan by reference to a contemporaneous record, Com. Ex. 971-31 A: Letter dated Dec. 1, 1930, Coogan to Brown of Alpha.
Coogan, *supra*, Tr. 23286-87, 23289.

> All subject to 10¢ cash discount and 5¢ dealers service.
>
> We found it practically impossible to get a dividing line in Southern Illinois where these prices would run out and in view of the fact that they do not seem to go much further than Bloomington, we are using these prices wherever they happen to go. The prices which we use will reduce the delivered prices in Missouri, Southern and Central Illinois and parts of Indiana and Kentucky.
>
> I am writing you this note as a matter of record and will put a copy of it in our scrap book for future reference.'"[3]

Coogan confirmed this in his testimony and said that the memorandum "really refers to the, what some people refer to as the establishment of a base at another mill."[4] He summed it up by saying:

> "* * * All I can say is that our company found the mill with the plant at Cape Girardeau making lower prices in the field which we serve from our Alpha, Mo., mill. We figured those prices back and then gave full force and publicity and based all our prices in that territory on that same figure." (Tr. 24587-88)

Asked whether the establishment of this base was a retaliatory measure Coogan said:

> "A. No, it was an effort on our part, a sincere effort to try to meet the competition at the destinations which we found the company and mill at that point quoting, according to the best information that we got." (Tr. 23289)

Coogan testified that since December 1930 there has always been a base at Cape Girardeau and so far as he could remember, any changes made in that base since that time were instituted by the Marquette Company (Tr. 23289).

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[3] Com. Ex. 971-31 A.

[4] (R) Tr. 23286.

Wecker, President, and Colburn, Vice President of Marquette, confirmed the Alpha version.

Wecker called as a Commission witness, testified as follows:

> "My recollection, Mr. Wooden, is that cement companies, I don't know whether it was the Alpha Company or any other, or all of them quoted prices at many times during the period you speak of and—or, I should say, with the idea or with the apparent idea of meeting prices that we had been making. (Tr. 14013)
>
> Q. And meeting them where? Meeting them at Cape Girardeau or meeting them at destination. A. At the market place.
>
> Q. Well, what do you mean by that? A. The place where cement is sold.
>
> Q. Well, you mean by that when competitors found that some of your delivered prices were low—A. (Interrupting) Yes; lower than theirs.
>
> Q. (Continuing) —that they put out prices which made them take that low a mill net on all your business from Cape Girardeau? A. Oh, I don't mean that at all. All I said was that they put out prices which were apparently trying to meet the prices that we were selling at." (Tr. 14014)

Colburn, called by Marquette, testified that Marquette established a constant mill net at Cape Girardeau for the first time in 1930.[5] His cross examination continued:

> "Q. It became what is known as a basing-point mill? A. That is what somebody called it, a basing-point mill. That is the terminology that they used.
>
> Q. You say you became a basing-point mill by action of your own that did not involve similar action by any other mill? A. I do.
>
> Q. You read Mr. Coogan's testimony about that? A. I did.
>
> Q. With regard to that last question and answer, is it not a fact that you had made some prices which

[5] (R) Tr. 40010.

reflected a mill net at Cape Girardeau which was the equivalent of a price established for Cape Girardeau by the Alpha Company? A. Well, we established a price ourselves. We made those prices, not Alpha." (Tr. 40010-11)

Colburn testified further that Marquette had not made those prices on all its business in that area, although on an important part of it.[6] Coogan testified that putting in a base at a mill "might be one aid" to "help control competitive conditions."[7]

There is testimony by some of Marquette's competitors that Marquette was known as a "price-cutter";[8] that it gave deals of "a dime off" to all line yards;[9] that it reached out for tonnage and got it "probably" by cutting prices;[10] and that for some years prior to 1933 Marquette and others were quoting below the lowest combination of base plus freight.[11] Coogan testified that Marquette was more active than other competitors in making lower delivered prices.[12] Affleck, former President of Universal Atlas, said Marquette was the "most aggressive, and active and destructive" of the competitors of Universal Atlas in getting business away from them.[13]

An interoffice letter of Cowham Engineering Company dated May 6, 1929 said:

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[6] (R) Tr. 40011.

[7] (R) Tr. 24505.

[8] Tyler, President, Dewey (C) Tr. 14343; Royal, Attorney, F.T.C., reporting statements of Tyler of Dewey (C) Tr. 12393, and Condon of Hawkeye (C) Tr. 19640.

[9] Capen, Vice President, Dewey (C) Tr. 12703.

[10] Horner, President, Kosmos (C) Tr. 12413.

[11] Fellows, Sales Manager, Alpha (R) Tr. 25862-63.

[12] (R) Tr. 24596-97.

[13] (C) Tr. 13047.

[Italicized part quoted in Fdgs. Par. Ten (f)]

*"A 60¢ Cape Girardeau base, I understand was narrowly averted last week. This has been brought about by Marquette and I am not at all sure it will not be the base price there before the summer is over * * *."* (Com. Ex. 2379 B)

Colburn's testimony conceded that Marquette had cut prices freely and added that Marquette had "earned" that reputation by its "independence".[14] In addition, Wecker and Colburn testified that Marquette has always been independent in its operations with respect to making prices, and made its own prices as it saw fit to make them;[15] that Marquette underbid competitors in order to get business (although Marquette had no policy in that respect);[16] and that Marquette's prices have been lower than its competitors' prices at times,[17] and frequently.[18] On cross examination Colburn testified that price cutting means that the destination prices are less than the lowest combination of some "constant mill net" plus rail freight.[19]

During the depression years of 1931 and 1932 Marquette's mill net at Cape Girardeau was gradually being reduced.[20] One of the incidents was referred to in a letter dated March 13, 1931 from Capen, Vice President of Dewey, to Tyler, President of Dewey:

[Italicized part quoted in Fdgs. Par. Ten (f)]

"Illinois is taking bids again on March 26, and I am wondering what will happen. If somebody

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[14] (R) Tr. 39049.

[15] Wecker, President, Marquette (C) Tr. 14003-04.
Colburn, Vice President, Marquette (R) Tr. 39945-46.

[16] Wecker, *supra*, (C) Tr. 14005-07.

[17] Id., Tr. 14007.

[18] Id., Tr. 14086.

[19] (R) Tr. 39988.

[20] Wecker, *supra* (C) Tr. 14010-12.

*could get Marquette in line to bid with the rest there would be a chance of the awards being made. As long as Marquette continues to cut and take all the business, I doubt if the State will make awards, * * *''*[21]

[Italicized part quoted in Fdgs. Par. Ten (f)]

On May 25, 1931 the base price at Cape Girardeau was reduced to $1.00 stripped.[22] On August 13, 1931, Tyler acknowledged a letter from Capen which advised that *''the Marquette Company are making deals of 10¢ off to practically all lineyard lumber companies''* and commented that the *''practice has of course been chronic with them during a long period of time.''*[23]

Koch, Lone Star Vice President testified that in the late spring (probably June) of 1932 Lone Star learned from its customers and sales force that Marquette was quoting prices 25¢ below those of Lone Star which figured back to 75¢ stripped at the Cape Girardeau mill. In some cases the prices quoted were as low as 58¢ at that mill. To meet this competition, Lone Star issued quotations on June 3, 1932 reflecting a base price of $1.25 cloth or 75¢ stripped at the Cape Girardeau mill.[24] On cross examination Koch testified that it was his recollection that there had been a 75¢ base at Cape Girardeau before Lone Star used that figure,

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[21] Com. Ex. 2178.

[22] Resp. Ex. 2497 B: Universal Atlas Price Sheet #1, dated May 25, 1931.

[23] Com. Ex. 2185.

[24] Koch, Vice President, Lone Star (R) Tr. 32753-59.

Resp. Ex. 2352 A: Memorandum, June 2, 1932, J.W.J. to H.C.K. re Coahoma County, Mississippi Paving.

Resp. Ex. 2352 H: Telegram, June 13, 1932, Lone Star, Alabama to Koch, International Cement Corporation.

Com. Ex. 3325: Price Memorandum No. 7, June 8, 1932, Stone, Vice President, Universal Atlas to R. H. Hoy, et al.

but he did not recall that Alpha had "put in" that base.[25] At that time Lone Star's bases in Indiana and Kansas were higher than 75¢.[26] In 1931 or 1932 Koch said Lone Star had also quoted prices to Illinois for highway work based on La Salle. He thought Marquette at La Salle "as near as we could find out" was "setting the price and we sought to meet such price".[27]

Coogan testified that Marquette itself had instituted a successively lower Cape Girardeau base until it went down to 85¢.[28] Colburn of Marquette testified that prior to 1933 when he was made assistant to the President he worked on special assignment to large jobs. Part of that assignment was making prices to "fit the jobs as they came up" and the company made special prices on large jobs lower than its going commercial prices.[29] He could not give any occasions since 1933 when Marquette gave special prices on large jobs.[30]

j. Subsequent Events

At a meeting of the Institute membership in Districts 5, 7 and 8 on June 23, 1933, the following provision was recommended to be included in a tentative draft to be proposed to the NRA (Com. Exs. 828-6 T-6 W, 828-7 F, 7 G):

[Italicized part quoted in Fdgs. Par. Ten (g)]

"Fair competition requires fair standards in the attitude of each member of an industry toward his competitor, to the end that competition may be hon-

* * *

[25] (R) Tr. 33234-35.
Alpha's Burns & Clark Questionnaire answer indicates that it had used the 75c. Cape Girardeau base on June 6, 1932. (See p. 535, *supra*; Com. Ex. 975-4 J.)

[26] Koch, *supra*, Tr. 33235-36.

[27] (R) Tr. 33236-37.

[28] (R) Tr. 24588-89.

[29] (R) Tr. 39944-46.

[30] (R) Tr. 39955-57.

est, open and fair. The following practices are not in accord with this standard and will not be used:

* * *

5. For a manufacturer to establish a maximum (base) price at the mill of a competitor constitutes an act of unfair competition."

No action was taken by the Board of Trustees of the Institute regarding this proposed recommendation to the NRA.[1]

In December 1935 Horner, President of Kosmos, prepared a memorandum on the subject which he forwarded to B. H. Rader, Vice President of Lehigh. This read as follows:[2]

"MEMORANDUM

Regardless of whether there is an acceptable revision of N.R.A. or not I have lost any expectation that we shall get a system of open prices under Government auspices that will be adequate in fact finding and enforcement. I believe an open price and a one price system is the only one fair to customers and that it is essential to the well being of our industry. Moreover I believe that we can ensure such a system in a way that is both legal and economically sound.

[Italicized part quoted in Fdgs. Par. Ten (h)]

Practically all manufacturers want an adequate price for their product. Some, however, noting the great effect of volume upon costs and the great effect of a cent or two off the price on sales, try to secure both a satisfactory price and an unusual volume by small secret price cuts. So long as these cuts remain really secret (which is seldom) or so long as the great majority of competitors ignore them, such a policy is highly profitable to its followers. But it is very bad economics for the competi-

[1] Com. Ex. 606 A-J: Minutes of Special Meeting of Board of Trustees in Chicago on June 27-28, 1933.
Com. Ex. 607 A-G: Minutes of Special Meeting of the Board of Trustees in New York on July 26, 1933.

[2] Com. Ex. 817 G-H.

[Italicized part quoted in Fdgs. Par. Ten (h)]

tors not to meet the real prices: The great over-productive capacity of our industry is largely due to that policy in the past. At the same time it is bad practice, leading straight to chaos, for each manufacturer to take individual action purely on his own information or suspicions: there is too much room in that for biased reports, personal dislikes, hasty assumptions and so forth.

What is needed is that everyone in the industry shall know that if he reduces the going price, no matter by what subterfuge, the general open price will fall to his figure and that this principle will operate with the same certainty as the law of gravity. As a first step to assure such certainty all available sources of information must be used: short of a complete audit of the books, which probably cannot be had, the consensus of opinion of the competitors directly affected is the best criterion of whether a price has actually, by any means whatever, been changed. As a second step there must be a determination on the part of the individual companies, if there has been a deliberate and intentional cut, to follow it, regardless of an apparent temporary loss by so doing. That is the price of stability and in the long run it is the cheapest way of getting stability at a fair level of prices.

A plan to carry out the foregoing might be as follows:

(1) Continue reporting past transactions as under the Code and as permitted by the Supreme Court decree in the cement cases.

(2) Elect from time to time a Chairman and a Vice-Chairman for each State (or subdivision of a state if found desirable) and hold regular meetings every two weeks, the days being staggered as between adjoining states. Additional emergency meetings could be had on call or the regular meetings could be reduced if the need for them were less. All companies shipping into a state would be asked to send a representative to each meeting.

(3) The meeting would be a fact finding jury, each company present having one vote. Any accu-

[Italicized part quoted in Fdgs. Par. Ten (h)]

sation as to a lowered price would be written to the Chairman with the supporting facts, anonymously, far enough in advance to enable him to notify the company suspected so that the latter might have its representative present prepared to reply. The Chairman would read the accusation and as far as possible the identity of the accuser would remain unknown in order to reduce personal feeling. After the reply and any discussion that might follow one representative for each company would vote anonymously as to whether the price had actually been changed, and, if so, to what amount. In case a company accused did not attend or answer the jury would have to decide without the aid of that side of the case. Without being bound to do so, which would be illegal, there would be a strong influence upon each individual manufacturer to guide his course by the verdict of the jury.

There is nothing very original, in the foregoing. It simply offers a plan of applying the truths of competition in the industry in an orderly and persistent way. No one will dispute that these truths are:

(1) One brand of cement cannot be sold at a higher price than that at which some other brand is offered.

(2) To refrain from meeting lower prices does not stop them, through the force of example, but encourages further lowered prices.

Nor is there anything illegal in the plan. Under it a manufacturer might lower a base price to protect his territory, without criticism. He will be under strong influence, but no agreement not to reduce his prices secretly and sporadically to favored customers. This influence will not come in the form of persuasion but from knowledge of the fact that his act will be detected and he will lose its advantage. Surely this would be in furtherance of the spirit of the Clayton Act while not running counter to the Sherman Law."

Horner testified about this memorandum as follows:

"A. I prepared this shortly after the N.R.A. went out as a possible substitute for it.

Q. And I believe the record shows that you handed them to Mr. Rader; is that correct? A. That is my recollection. I handed it to him because he had been chairman of the Code Authority.

Q. And what reaction did you get from Mr. Rader? A. Apparently Mr. Rader sent it to his president, Mr. Young, and Mr. Young wrote back, I believe, to Mr. Rader. I saw the letter afterwards. I am not quite certain whether Mr. Young sent me a copy directly or not. Anyway, Mr. Young's reaction was that the plan was very questionable legally, and on second thought I rather agreed with him, and that was the end of the thing.

Q. Did you take that plan up with anybody else? A. No. That was the end of it.

Q. And to your knowledge, was it ever discussed at an Institute meeting? A. No, I have no recollection of such a discussion.

Trial Examiner Norwood: Let me see it.

(The document was handed to the Trial Examiner.)

Trial Examiner Norwood: Now, does this contain some of the things that afterward appeared in the Compendium?

The Witness: Well, I am not at all familiar with the Compendium, but I should not think so. That was my own idea.

Trial Examiner Norwood: Well, was it?

I just would like to know, you submitted this for discussion and consideration, didn't you?

The Witness: Well, I cannot say that I submitted it to The Cement Institute officially. I handed it to Mr. Rader because he had been chairman of the Code Authority and this was at a time when we were all wondering whether the N.R.A. would be reestablished in some form.

* * *

Trial Examiner Norwood: In this paper, Commission's Exhibit 8? G, you say the great

over-productive capacity of the industry is largely due to that policy in the past. That is largely due to competition, the policy of companies trying to get volume and maintain price at the same time; you refer to getting volume by secret price cuts at the time.

The Witness: Yes." (Tr. 37001-03)

On cross examination he testified as follows:

"Q. Don't you recall, Mr. Horner, that you requested Mr. Rader to present this at a board of trustees' meeting of The Cement Institute on December 9, 1935, three days after that letter was written—that memorandum was written? A. I do not recall any such request, no.

Q. Is it your testimony that you did not tell him to present that to the board of trustees? A. I can't testify one way or the other on that. I have no recollection.

• • •

Q. Now, on direct examination, today, Mr. Horner, you testified that you did present this to Mr. Rader as a suggestion of yours of something to replace the Code, which had gone out. A. That is right.

Q. And you did know that these trustees were meeting just the next day for the purpose of deciding what course of action should be taken by The Cement Institute after the Code had gone out, didn't you? A. I can't say at this time whether I knew the trustees were meeting then or not. I was not a trustee myself. I may have known it, or I may not have known it. I couldn't tell you. So far as I know, this was never presented to the trustees as a body.

Q. Well, you have been informed that the trustees did consider trade practice plans at the meeting the next day after you submitted it to Mr. Rader; is that correct, and that they had adopted—— A. Just a minute.

Unless I had seen the minutes of the meeting, I would not have known. I do not know whether I saw the minutes of that meeting or not.

Q. This memorandum was written by you before you went to Chicago as an expression of your experience in the industry, wasn't it? A. It—yes, it does reflect my experience.

Q. You did know at the time you handed this to Mr. Rader that he had considerable to do with the trade practice committee of The Cement Institute; is that correct? A. I can't say at this date how much I knew about the trade practice committee of The Cement Institute.

Q. You also did know, didn't you, Mr. Horner, that Mr. Rader was an official of the company which had a few years previously placed a base at your mill at Kosmosdale, Ky?

• • •

A. I testified when I was on the stand before, as nearly as we could find out from the destination prices, it was the Lehigh Company that first figured a base at our mill, and, of course, Mr. Rader is an official of The Lehigh Company." (Tr. 37060-63)

Rader apparently forwarded Horner's memorandum to Young, President of Lehigh, for one month later Young wrote Rader as follows:

"The memorandum you recently forwarded me for comment raises so many points in connection with general marketing practice that it would be well nigh impossible for me to submit my reactions without going into considerable detail. With the thought that we may have an opportunity to discuss this matter personally sometime in the near future, I should like to touch upon only a few of the highlights presented.

[Italicized part quoted in Fdgs. Par. Ten (h)]

The basic principle upon which the plan is predicated is that force is the only practical stabilizer. What is meant by force, I presume, is price. As you know, I have always been firmly of the opinion that it is only through price control that stabilization can be accomplished and I agree wholeheartedly with the argument that the threat of general price

reductions to meet lower competitive prices in the field is the only method that has yet been discovered to insure price maintenance.

From a legal standpoint it seems clear that any company has a right to raise or lower its own base at will. Furthermore, it is equally clear that any competitor may meet our prices in the field by imposing a new base or openly lowering an old one at a competitive mill on the assumption that the competitor quoting such prices has in reality reduced his own basing point price. Therefore no legal objection could be raised against the plan of making general reductions to meet either open or secret lower competitive prices in the field.

However, there is a far cry between the method employed by certain individual companies in the past and the method advocated in the plan. For example, Lehigh at any time may elect to meet lower prices by a general price reduction. So long as we follow our practice of obtaining the evidence of reduced prices ourselves and so long as we retain the exclusive right to be the sole judge of price infractions, no legal objection can be raised. But the plan does not contemplate individual action. On the contrary, a tribunal consisting of representatives from the several companies in a district would be set up for the purpose of weighing the evidence and rendering a final verdict. My own impression is that any such joint action would be construed as a conspiracy to fix prices in restraint of trade and would therefore be in violation of the anti-trust laws.

There are two points raised by the letter of transmittal which I think should also be touched upon. I have stoutly maintained at every opportunity that each mill or group of mills in the country should be a basing point for the purpose of arriving at delivered prices. Moreover, I would argue that the basic price arrived at in each instance should be operative over a large portion of the market area normally served by such mill or group of mills. In other words, I would take the position that the type of base price which is so fashionable just west of the Mississippi is no base price at all but merely

a legal gesture. Personally, I am convinced that much of the criticism directed against the price structure in the cement industry would be satisfied were the industry to adopt the recommendation that each point of production should be a basing point.

I should like to take issue with the suggestion that our terms should be thirty days net without any discount. I am the first to admit that the present discount terms are a source of price trouble and much of the irregularity in the present market is due to credit concessions. However, in spite of the not overly strong financial condition of many of the buyers of cement the credit losses in the industry have been negligible. I attribute this enviable record almost entirely to the fact that our cash discount of ten cents per barrel for payment within fifteen days is so attractive to the customer that he can advantageously borrow money for the purpose of discounting his cement invoices. I trust that we may never see the time when the industry, because of the possibilities for price concessions, elects to abolish our present terms of payment.

[Italicized part quoted in Fdgs. Par. Ten (h)]

To summarize, I question whether there is any difference in principle between Lehigh's conception of market stabilization and the basic theory of price maintenance outlined in the plan. However, before discussions of the plan proceed further I would like to suggest that its proponent submit an outline to his attorneys for a specific opinion. I would be glad to hazard a little money that it is clearly beyond the pale. The desirability of establishing basing points at each mill or group of mills should be impressed upon the industry at every opportunity. I would much prefer not to tamper with our discount terms at this juncture. Please feel free to use this letter in whatever way you wish." (Com. Ex. 817 I-J)

8. Dual Bases

Six instances are shown in the record where base mills have reflected two price bases simultaneously, each used for a different area. When this occurs it is referred to as

a dual base.[1] This has occurred at Alpha's mills at Ironton, Ohio[2] and St. Louis, Missouri;[3] Lehigh's mill at Union Bridge, Maryland[4] and its grinding plant at Cleveland, Ohio;[5] Medusa's mill at York, Pa.,[6] and at the Lehigh Valley.[7] At one time the Wyandotte base of Huron was limited in that it was used only for pricing in the State of Michigan and nowhere else.[8]

Coogan, Vice President of Alpha, testified that at or about February 1930 Alpha instituted a dual base at its Ironton mill.[9] Coogan explained how this came about as follows:

> "I think the records will show that at that time we were quoting a very low price at our Ironton mill. We were quoting a price at Birmingham which was somewhat higher. There came a time when we decided to advance our price at Birmingham, and I think the advance at that time was something like thirty cents, twenty cents or thirty cents, per barrel. Now, that advance at Birmingham of the Birmingham price or Birmingham base, which we were using, had we advanced the Birmingham base which we were using and had not in some way restricted the Ironton base from running down into that territory, it would have had Ironton making a price in the

[1] Findings, Par. 7 (e).

[2] Coogan (R) Tr. 23128-31, 23284-994.

[3] Id., Tr. 23278-79.

[4] Bowen, Vice President, Lehigh (R) Tr. 26908-09.

[5] Id., Tr. 26911.

[6] Com. Ex. 1125: List of base prices.

[7] Com. Ex. 969-7 C: Lawrence answer to Burns and Clark questionnaire.
Ackerman, Vice President, Lawrence (R) Tr. 31206-07.

[8] Bowen, *supra*, Tr. 27203-04.

[9] (R) Tr. 23127-28.

territory which we were serving from our Birmingham plant. Now, we did not feel—at the time that this Birmingham change was made, we did not feel that the conditions in the southern Ohio area was such that we would want to advance our price at that mill at that time. And instead of doing that, when we got south of Virginia-North Carolina line, we used a higher price—a higher base out of Ironton than we had in quoting the regular territory served by that mill.

Q. Did you, at any time, have any agreement or understanding with any of your competitors as to what you would or would not do at Ironton? A. I certainly did not have any understanding or agreement of any kind.

Q. And from what you have said, when you put in that restricted base, as you have described it, did you make any secret as to its application? A. No. Of course, there are very few secrets in the cement business. It is easy to find out anything that happens. Now, we or any one else who is anxious to find out how a base is being applied, can find out how a base is being applied, where it is being applied, or what it is. We made no secret whatever, and I would not hesitate to tell anybody who asked me what I was doing or what I had done.

Q. Now, from what I understand from what you have said, I take it that this restriction was public, or was it not public? A. It was public in the sense that it could easily be checked up by your competitors as to how you were applying your price by a little investigation."[10]

Testifying in September 1939 Coogan subsequently stated that Alpha was using a dual base at Ironton "today" and had been using it since about 1932 or 1933 except for a short period.[11]

At its St. Louis mill Alpha had a base which applied for St. Louis and St. Louis County which was ten cents

[10] (R) Tr. 23128-29.

[11] (R) Tr. 23994.

lower than the base it used in quoting delivered prices outside that area.[12] Coogan testified that Alpha used the lower base in that area "on account of a competitive situation which we felt existed in that market and we felt the conditions warranted a lower price in that territory".[13]

Alpha eliminated the dual base at St. Louis according to Coogan because:

> "We then came to the point where for competitive reasons we were compelled to reduce our prices, and that reduction, as I remember it, amounted to 30 cents a barrel, and instead of reducing both bases 30 cents a barrel we reduced the higher bases 30 cents per barrel, and then continued using the one base for both—for points both in the county and outside of that territory."[14]

Vice President Bowen of Lehigh testified that his company had used two base figures "in a few cases under special circumstances" and said that he specifically recalled two cases, one at the Union Bridge, Maryland plant, and the other at their Lehigh Valley mills. This occurred "during 1931 or 1932 during the time of the rather general price war in which we were engaged".[15]

Explaining the situation at Union Bridge, Maryland Bowen testified as follows:

> "Taking the case of Union-bridge, we found that in the State of Maryland and in the District of Columbia, although we had quoted prices figured on our Union-bridge mill that were extremely low and well below our cost, that there still continued to be a great number of cases in which we were unable to sell because our competitors were offering secret concessions. This condition was confined very largely

[12] (R) Tr. 23278-79.

[13] (R) Tr. 23279.

[14] (R) Tr. 23995.

[15] (R) Tr. 26909.

to Maryland and the District of Columbia and was not as extreme in the territory to the north and south; that is, in the southern part of Pennsylvania and the northern part of Virginia, which was also included in our Union-Bridge territory, and because we saw no particular reason to extend the extremely low prices beyond the areas in which the most extreme competition existed, we quoted delivered prices in Maryland and the District of Columbia involving a further reduction in the already low prices there and the effect was to reflect a lower base figure at our Union-bridge plant for that portion of the territory than was reflected by our prices for the remainder of the territory."[16]

With respect to the dual base at Lehigh's Lehigh Valley mills Bowen testified that it affected the State of New Jersey.[17] Explaining this he stated that the situation was much the same in principle as at Union Bridge and continued:

"There was a great amount of work coming up in the State of New Jersey and there there seemed to be centered a tremendous amount of price cutting below the manufacturers' published prices.

At about that same time, also, we found foreign cement coming into New Jersey rather heavily and being sold at extremely low prices. There, too, because our prices were already so very low, we decided to quote new prices still lower which would be confined to the particular territory in which the competition was most extreme, and, again, the effect of those low prices confined to the State of New Jersey was to give us a new base figure at our mill for that territory."[18]

[16] (R) Tr. 26909-10.

[17] (R) Tr. 26909.

[18] (R) Tr. 26910.

The situation at Lehigh's Cleveland grinding plant was "similar" and prices "reflected a lower base figure at Cleveland than did the remainder of the territory".[19]

As to the duration of those dual bases Bowen testified:

> "In the case of Maryland and the District of Columbia the situation continued, as I recollect it, for about a year. In the case of the Lehigh Valley base figure applying to the State of New Jersey, it continued about six or seven months. During that time we found that price concessions below a manufacturer's public prices were gradually lessened in number; that there seemed to be a disposition on the part of manufacturers to abide by their published quotations.
>
> As that situation developed it seemed to us that the market justified us in attempting a new quotation at a slightly higher level, the effect of which would be to eliminate the lower base figure."[20]

Alpha produced office records relating to its discovery of the dual base used by Lehigh affecting the State of New Jersey.[21] Coogan was shown a letter addressed to him by the Chief Clerk of Alpha's Sales Department in which it was stated that a new low delivered price was effective in the State of New Jersey only. He was asked how he knew that the application of the new price was limited in that way and testified:

> "Well, I think that the letter indicates very clearly that previous to the receipt of this quotation showing this price at Easton, we had picked it up at several different points in New Jersey, quotations which indicated that at that time the Lehigh Portland Cement Company were quoting on that basis for shipment to those particular towns.

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[19] (R) Tr. 26911.

[20] (R) Tr. 26911-12.

[21] Resp. Exs. 520, 521.

We have also found—Easton is a border town, and dealers in Easton compete with dealers located in Phillipsburg, New Jersey, just across the river, and when we found this quotation along with some other quotations along that border line point, we simply assumed that they were applied to the border towns in order to equalize competition as between dealers on one side of the border and on the other side of the border."[22]

Ackerman, Vice President of Lawrence, said it did not take him "very long" to analyze quotations found in the field which reflected the dual base for New Jersey, and continued:

"That was simple because if you know your geography down around that area, Philipsburg is on one side of the river, which is New Jersey, and Easton, Pa., is on the other side of the river, and there are several more instances, Trenton, and so forth. You apparently—it is not very clear to you just what we go through, but if you will let me explain it I think I can make it clear to you and you can understand it.

Q. I wish you would. A. If I go in my office tomorrow morning at 9 o'clock, if there is a price change in the field, I will hear of it by 5 minutes past 9. The minute I hear it—we will say it is in, the first person to call me was from New Jersey somewhere. Immediately I will get in touch with my district manager in New Jersey and several clerks and say, 'Call up so and so, so and so, and so and so. It looks like something is doing. See what you can find out.' They do it. They will come back with some information of one sort or another. We act from there on. If they come back with fifteen, 'Yes, it is down here, it is down here $2.51 here, whatever it is, $2.61, $2.28 here; it was $2.38,' and so forth and so on. It does not take long before you establish some sort of pattern. The same thing is true so far as the dual base, Easton on one side of the river and Philipsburg on the other, two big market-

[22] (R) Tr. 23282.

ing centers. When I start checking, if we call somebody in Easton, maybe the General Builders there, or I don't recall the particular instance, and it is not—was not anything mysterious to me as a cement man that we are stopped at the river."[23]

For example, the Alsen (Hudson Valley) base was for years maintained at 10¢ above the Lehigh Valley base.[24]

Magee, Vice President of Alpha, testified that the "quarrying operation at the Catskill plant is very much more difficult and very much more expensive. * * * The rock is harder. And in every respect they are more difficult to operate, and it costs us more to quarry stone at Catskill than it does at Martin's Creek."[25]

Coogan, Vice President of Alpha, testified that "It hasn't been 10¢ higher,—there have been times * * * back in the past when it has been the same, and at the present time [October 1939] it is 20 cents higher than the Lehigh Valley."[26] This differential was due to a reduction early in 1938 of the Lehigh Valley base by a competitor which Alpha followed as it made a lower price "and in the judgment of our company it was not wise for us to make a similar reduction at our Hudson Valley mill and we did not do it." To some extent the territory in which the Lehigh Valley base made the lowest delivered price was enlarged.[27]

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[23] (R) Tr. 31317-18.

[24] Fdgs., Par. 7(e).

[25] (R) Tr. 22573-74.

[26] (R) Tr. 24570.

[27] (R) Tr. 24572.

E. "Arbitrary" or "Special" Prices.

1. General

As shown in Section D, I, *supra*, cement delivered prices do not always reflect the sum of a mill "base price" plus freight.[1] In such case they are often referred to as "arbitrary" or "special" prices. Affleck, former President of Universal Atlas, testified on this subject as follows:

> "Q. You always make your price by a price base plus freight. There haven't been many statements, I believe, in this case that amounts to making your price on a formula.
>
> Would you discuss that, or give your reaction to whether that means formula? Why do you do it that way? Why don't you just put a bunch of figures in a hat, pick one out for Fort Wayne, and another one for Indianapolis? A. Well, the word formula is of recent origin, as far as the cement industry is concerned. Having been in the business a long time, the method of pricing, making a price delivered at destination, has just been a matter of growth, not a system, nor a—nor a formula, just a—just a practice which came into use by reason of the fact that it was the simple, logical method of marketing our product.
>
> Perhaps I should say that there are exceptions to that general rule where there are certain zones in—most of them, I guess all of them in and around large cities, like Chicago and Pittsburgh, and metropolitan New York, and Cleveland, where the—it would be quite impracticable to have a great variation in price depending on varying freight rates to reach customers' yards on different railroads.
>
> Q. Then, what do you do in such zones? A. In a zone of that sort, we would try to arrive at the average freight from our mill to the points in the zone, and we make a uniform price to all customers within that zone.

[1] pp. 337-349.

Q. You mean to say that you use an arbitrary freight rate for all shipments into that zone? A. Arbitrary, yes.

Q. It might be a mean or might be a low—— A. Might be a mean or an average. I don't like the word 'arbitrary' exactly, because it seems opposed to reasonable. But it would be quite out of the question for us to sell or offer to sell cement to a dealer here at a certain price and offer to sell a dealer who might be right across the street at a higher price, because this railroad over here was a different railroad and reached through two or three switching lines, while they, in their respective local territories, are competing with each other, and they must necessarily buy at the same price. (Tr. 34833-34)

• • •

A. Then another reason which tends to set up a zone price in the metropolitan area, is the fact that the freight rates from outside mills, in all probability, is the same to all these points.

Q. You mean by mill—— A. From one mill to different points, there may be quite a variation, but from another mill more remote, those destinations would all be in one group, see.

Q. In other words—— A. That has worked very satisfactorily. Customers have recognized the fairness of it, and it's gone along very smoothly.

Q. You mean that the mill close to the city might have different freight rates, different freight rates to different points in the city, but that a mill, say, a hundred miles away—— A. Would have a uniform——

Q. —Might have a freight rate that would be uniform to any part of the city? A. Yes.

Q. Well, then, that zone price is an exception to the—— A. Exception to the rule.

Q. To the rule that you stated a moment ago of your general method? A. Yes.

Q. Of making prices? A. Yes. (Tr. 34835-36)

• • •

Q. Well, now, are there any other exceptions to this general method of making price? You have

named zone prices. Do you have some other exceptional prices? A. There would be another exception where, if I remember correctly, to meet foreign competition, particularly in a city like New York——

Q. What do you call those? What do you call those prices? A. Those are arbitrary prices, zone prices or perhaps more—I think the word 'depressed' prices has been applied to those areas.

Q. Do those prices have any relation whatever to the freight rate on price base or not? A. No, no." (Tr. 34836-37)

Mr. Affleck said he could not think of any exceptions to Universal Atlas policy of using its base plus freight, other than arbitrary prices and zone prices except for the times of "great irregularity" involving secret price cutting.[2]

Neylan, Assistant General Sales Manager of Lone Star, asked if the company did not use "the lowest sum of the base price plus the freight" testified:

"A. Well, that is not true in all cases, no, sir; there are some prices that we have to meet in the field that we cannot actually determine definitely how they are made.

Q. Those are non-basing point mills? A. Not necessarily. There may be some price put in by somebody for some purpose or other—I don't know what it is—but if we find that price, it is either a case of meeting it or not. (Tr. 6280)

• • •

A. I have in mind where there are prices in effect which you cannot really check back to any particular mill.

Q. And arbitrary prices so-called fall in that category, don't they? A. They are referred to as arbitrary prices. I never did like the word.

Q. But it is a common method of reference in the industry, isn't it? A. We try to stay away from it.

Q. Why? A. Because the word indicates that it does not mean anything. It is just something that has no connection with anything.

[2] (R) Tr. 34842.

Q. I suppose 'arbitrary' does mean that? A. It does.

Q. As you say, the arbitrary prices do not represent any base price plus freight? A. That is, the usual mill producing points." (Tr. 6282)

Reiter, Vice President of Universal Atlas, questioned as to such prices as a Commission witness, testified:

"Q. Are these special port prices to meet foreign competition sometimes referred to as arbitraries? A. Well, I do not refer to them myself, Mr. Wooden.

Q. Have you heard them so referred to in the industry? A. Yes, I have.

Examiner Norwood: Are they arbitraries?

The Witness: I would say that they are special prices. I do not know what is entailed by the word 'arbitrary', your Honor.

By Mr. Wooden:

Q. In what sense are they special prices? A. They are not the sum of the known so-called base price plus freight to that destination." (Tr. 4487)

Wing, Vice President of Penn-Dixie, asked what was meant by "arbitrary prices" referred to in a Penn-Dixie circular, testified:

"A. I presume that it is what our clerks called them. I did not know whether you called them the same thing or not.

Q. Aren't you familiar with the term in the industry? Isn't it widely used in the industry? A. It is frequently used.

Q. Are not arbitrary prices the delivered prices which are not the sum of the base price plus the freight? A. I presume so. I call them special prices.

Q. That is what they are, no matter what you call them? A. Yes." (Tr. 8090-91)

There have at various times been "arbitrary" or "special" prices in New England and along the New England

coast[3] in the switching area of Boston[4] and about 30 or 40 miles westward,[5] in New York and surrounding areas,[6] in the southeast, starting from North Carolina southward to certain sections of Florida,[7] in Virginia, the eastern shore of Maryland, Delaware, Pennsylvania and sections of New the southeast,[7] starting from North Carolina southward to Jersey,[8] Chicago, Pittsburgh,[9] Washington, D. C. and a "considerable distance around", Baltimore and "surrounding territory" and a great many other locations throughout the country.[10] Several companies, answering the FTC Questionnaire in 1931, also listed "arbitrary" prices at various localities in response to the question requesting basing points and base prices used by them.[11]

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[3] Neylan, Asst. General Sales Manager, Lone Star (C) Tr. 6043, 6532-34.

[4] Id., Tr. 6592-93.
Reiter, Vice President, Universal Atlas (C) Tr. 3938.

[5] Twamley, Vice President, Coplay (C) Tr. 6903-05.

[6] Reiter, *supra*, Tr. 3938.
Neylan, *supra*, Tr. 6532.
Dain, Dealer (C) Tr. 7951, 7979.
Coogan, Vice President, Alpha (R) Tr. 25006.

[7] Neylan, *supra*, Tr. 6532-34.

[8] Id.

[9] Affleck, former President, Universal Atlas (R) Tr. 34833-34.

[10] Bowen, Vice President, Lehigh (R) Tr. 27135-38.
Koch, Vice President, Lone Star (R) Tr. 33150, *et seq.*
See also map on p. 562 and text on pages following for details.

[11] Medusa: Com. Ex. 3118 W-X.
Castalia: Com. Ex. 3121 F.
Pittsburgh: Com. Ex. 3133 F.
West Penn: Com. Ex. 3134 D, G.
Diamond: Com. Ex. 3139 D.
Universal Atlas: Com. Ex. 3141 J.
Standard: Com. Ex. 3169 C-D, F.
Peerless: Com. Ex. 3170 D.
Wolverine: Com. Ex. 2829 A.

LEGEND AND REFERENCES

● Port price used as base where rates on cement are available to inland points

Wilmington, N. C.	July, 1929	to	Aug. 5, 1932	Com. Ex. 971 - 25 X; Resp. Ex. 2502
	Feb. 22, 1937	to	July, 1937	Tr. 38299 - 301; Resp. Ex. 1199 B
Charleston, S. C.	July, 1929	to	Aug. 15, 1932	Com. Ex. 971 - 25 Y; Resp. Ex. 2503
	Oct. 26, 1936	to	July, 1937	Tr. 38299 - 303; Resp. Ex. 903, 1283 - 1286; Com. Ex. 586 - 4 L, 1111 C
Savannah, Ga.	July, 1929	to	Aug. 15, 1932	Com. Ex. 971 - 26 B, 3327 B, 975 - 12 J
	Oct. 26, 1936	to	July, 1937	Com. Ex. 586 - 4 L, 1111 C, 2366; Tr. 38299 - 303
Brunswick, Ga.	Feb. 22, 1937	to	July, 1937	Resp. Ex. 1136, 957; Tr. 26937, 38299 - 303
Jacksonville, Fla.	July, 1929	to	May 13, 1931	Com. Ex. 971 - 26 A, 975 - 12 J
	Oct. 26, 1936	to	July, 1937	Com. Ex. 1111 C, 2366; Resp. Ex. 1288, 1290; Tr. 38299 - 303
Miami, Fla.	July, 1929	to	Aug. 15, 1932	Com. Ex. 971 - 26 C
	Dec. 8, 1936	to	July, 1937	Com. Ex. 586 4 L; Resp. Ex. 1297, 1298
Port St. Joe, Fla.	Feb. 1937		?	Com. Ex. 415 (574)
Panama City, Fla.	Dec. 8, 1936	to	July, 1937	Resp. Ex. 1199, 1298
Pensacola, Fla.	July, 1929	to	Aug. 15, 1932	Com. Ex. 971 - 26 D, 3327 A
	Dec. 7, 1936	to	July, 1937	Com. Ex. 586-4 L; Resp. Ex. 819
Mobile, Ala.	July, 1929	to	May 13, 1931	Com. Ex. 971 - 26 E
	Dec. 8, 1936	to	July, 1937	Com. Ex. 586-4 L; Resp. Ex. 2909

★ Special price used as base where no rail rates on cement are available to inland points.

Boston, Mass.	July, 1929	to	Jan. 1, 1935	Com. Ex. 971 - 26 I, 958 - 4 Z, 1888 b
	Apr. 1, 1935		?	Com. Ex. 813 X - Y, 1099 M
	Sept. 11, 1935	to	July, 1937	Com. Ex. 286 F, 551 N - M
Providence, R.I.	May 1, 1929	to	Jan. 1, 1935	Com. Ex. 458 - 4 Z
Metropolitan New York City, N. Y.	July, 1929	to	Dec. 23, 1932	Com. Ex. 971 - 26 J, 2871 B, 2873; Resp. Ex. 2566 H
	July, 1, 1933			Com. Ex. 1438
	Apr. 1, 1935			Com. Ex. 1186 B
	Dec. 8, 1936	to	July, 1937	Com. Ex. 551 X
Baltimore, Md.	Dec. 28, 1936	to	July, 1937	Com. Ex. 551 - 2C, 1166 C - D; Tr. 33794; 33865 - 68, 33870
Washington, D. C.	May 10, 1937	to	July, 1937	Com. Ex. 1166 C, 1168 A

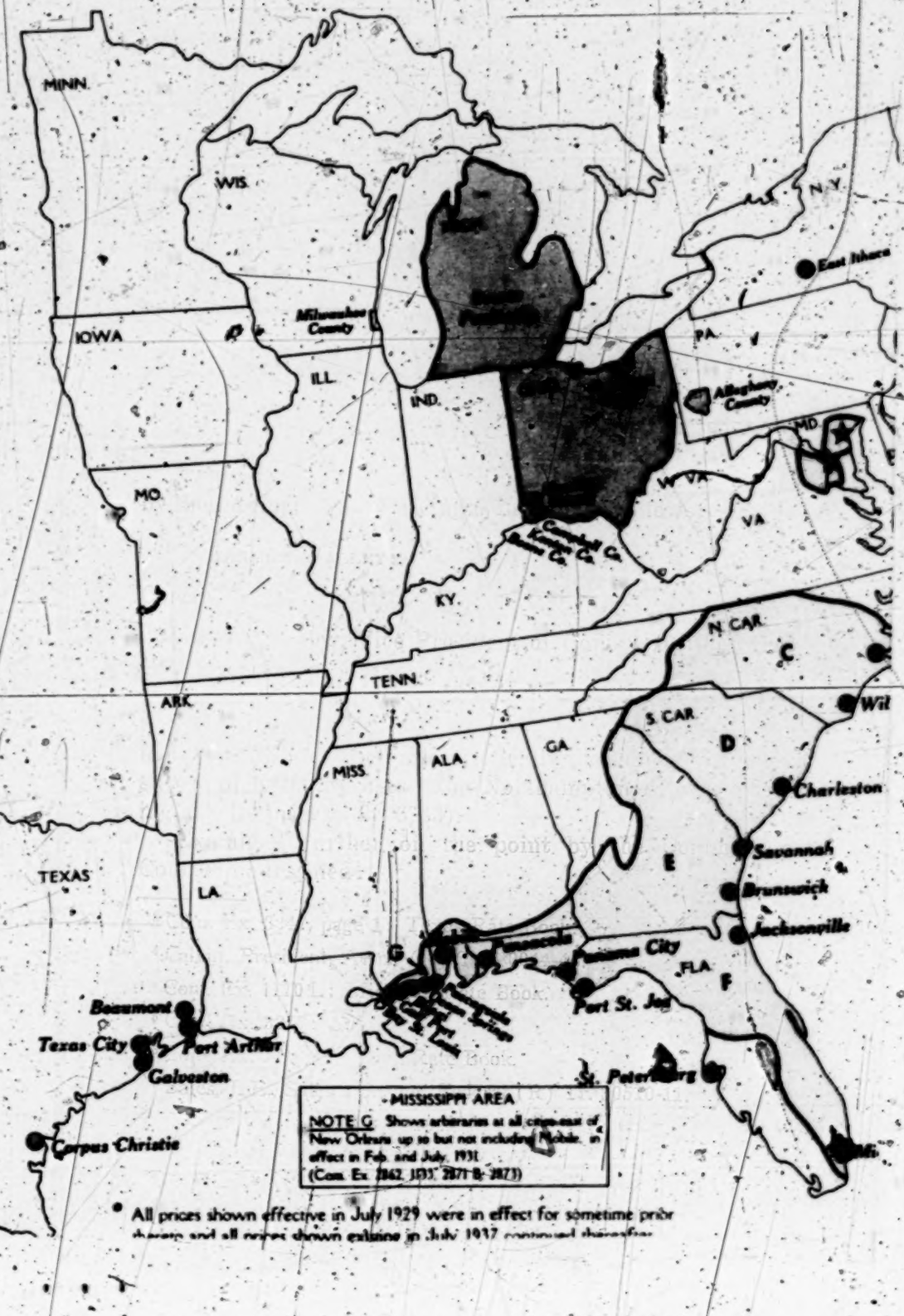
● Special price not used as base.

Portland, Me.	July, 25, 1927	to	Apr. 20, 1931	Com. Ex. 971 - 26 K
Kittery, N. H.	Sept. 11, 1935	to	Dec. 8, 1936	Com. Ex. 286 F, 308 F
East Ithaca, N. Y.	Feb. 3, 1931			Com. Ex. 2871, 958 - 4 W
	Feb. 23, 1932			Resp. Ex. 2566 Q
	Jan. 6, 1936			Com. Ex. 1442 B
New Bern, N. C.	Feb. 27, 1936	to	Feb. 11, 1937	Com. Ex. 1100 A, 1101 A
St. Petersburg, Fla.	Oct. 27, 1936		?	Resp. Ex. 1288
Pascagoula, Miss.	Feb. 8, 1930		?	Com. Ex. 2860
Ocean Springs, Miss.	Feb. 8, 1930		?	Com. Ex. 2860
Biloxi, Miss.	Feb. 8, 1930		?	Com. Ex. 2860
Gulf Port, Miss.	Feb. 8, 1930		?	Com. Ex. 2860
Bay St. Louis, Miss.	Feb. 8, 1930		?	Com. Ex. 2860
Beaumont, Texas	Oct. 1928	to	Aug. 25, 1932	Com. Ex. 967 - 11 D, 1948
Port Arthur, Texas	Oct. 1928	to	Aug. 25, 1932	Com. Ex. 967 - 11 D, 1948
Texas City, Texas	Oct. 1928	to	Aug. 25, 1932	Com. Ex. 967 - 11 D, 1948
Galveston, Texas	Oct. 1928	to	Aug. 25, 1932	Com. Ex. 967 - 11 D, 1948
Corpus Christie, Texas	Oct. 1928	to	Dec. 1931	Com. Ex. 967 - 11 D, 1948
	Aug. 1934	to	Oct. 1934	Com. Ex. 967 - 11 D, 1948

Areas of influence of port bases

Areas of uniform prices

Allegheny County, Pa.	Mar. 15, 1937	to	July, 1937	Com. Ex. 3344; Tr. 37699; Resp. Ex. 1109 B, 1420 A - L, 2037
State of Ohio	Jan. 31, 1931	to	May 16, 1931	Com. Ex. 970 - 15 V, 3169 C - D, 3134 G, 2871 B; Tr. 23290 - 91
Hamilton County, Ohio				Com. Ex. 970 - 12 Z, 1213; Resp. Ex. 1109 B
Cuyahoga County, Ohio	Jan. 28, 1928		?	Com. Ex. 969 - 2 B
	Feb. 19, 1930		?	Com. Ex. 3121 F, 3139 D
	Feb. 3, 1931		?	Com. Ex. 2871 A
	June, 1932		?	Com. Ex. 970 - 13 P
	Dec. 12, 1932		?	Com. Ex. 1121 N
	1935			Com. Ex. 970 - 12 Z
Lower Peninsula of Mich.	Jan. 4, 1937	to	July 7, 1937	Resp. Ex. 1995 E; Tr. 33668 - 70, 30037
Milwaukee County, Wis.	Dec. 12, 1930	to	May 27, 1931	Com. Ex. 3141 J; Tr. 33843
Kenton, Campbell and Boone Counties, Ky.	1935	and	1937	Com. Ex. 970 - 11 Z, 1213



● All prices shown effective in July 1929 were in effect for sometime prior thereto and all prices shown existing in July 1937 continued thereafter.

NEW ENGLAND AREA

NOTE A: Shows maximum effect of arbitraries feathered out of Boston and Providence and covers the period from Dec. 8, 1936 to July 1938. (Com. Ex. 551-N, S-W, 2 B)

Special prices affecting a smaller area in this section were in effect during or at the following periods:

(N. H.)	Sept. 11, 1935 to Dec. 8, 1936	(Com. Ex. 286 F, 308 F)
(Mass.)	Jan. 23, 1932 to unknown	(Resp. Ex. 2566 R-V)
(Mass.)	Sept. 11, 1935 to Dec. 8, 1936	(Com. Ex. 286 F, 308 B-E)
(R. I.)	Sept. 11, 1935 to Dec. 8, 1936	(Com. Ex. 286 F, 308 F)

METROPOLITAN NEW YORK AREA

NOTE B: Shows maximum effect of arbitraries feathered out of New York City and covers the period from Dec. 8, 1936 to July 1938. (Com. Ex. 551-N, S, X, Y, 2 B; Com. Ex. 870-13)

Special prices affecting a smaller area in this section were in effect during the following periods:

New York:				
Westchester Co.	(1) Feb 3, 1931	to	?	(Com. Ex. 2871 B)
" "	(2) July 30, 1931	to	?	(Com. Ex. 2873)
" "	(3) Jan. 23, 1932	to	?	(Resp. Ex. 2566 I)
" "	(4) July 11, 1933	to	?	(Com. Ex. 1437 A)
Rockland Co.	(5) Nov 25, 1929	to	Nov 2, 1930	(Com. Ex. 969-2 B, 2862)
"	(6) Feb 3, 1931	to	?	(Com. Ex. 2871 B)
"	(7) Jan. 23, 1932	to	?	(Resp. Ex. 2566 P)
Queens, N. & S.	(8) Jan. 23, 1932	to	?	(Resp. Ex. 2566 J-O)
"	(9) July 11, 1933	to	?	(Com. Ex. 1437 A-B)
"	(10) July 12, 1935	to	Dec. 7, 1935	(Com. Ex. 985 A, B, J)
New Jersey:				
Bergen Co.	(11) Nov 25, 1929	to	Nov 12, 1930	(Com. Ex. 968-8 F, 2862)
"	(12) Feb 2, 1931	to	?	(Com. Ex. 2871 B)
"	(13) July 30, 1931	to	?	(Com. Ex. 2873)
"	(14) July 23, 1932	to	?	(Resp. Ex. 2566 Q)
Connecticut	(15) July 11, 1933	to	?	(Com. Ex. 1437 A)

NORTH CAROLINA AREA

NOTE C: Shows maximum effect of arbitraries based on Wilmington, N. C. and Charleston, S. C. and covers the period from Oct. 26, 1936 to July, 1937. (Com. Ex. 994, 1101-B, 1110 Y, 1213; Resp. Ex. 1199 B, 2235)

A smaller area in this section was affected by port prices at Wilmington and Charleston at the times shown in legend.

GEORGIA AREA

NOTE E: Shows maximum effect of arbitraries based on Savannah and Brunswick, Ga., and Jacksonville, Fla., and covers the period from Oct. 10, 1936 to July, 1937. (Com. Ex. 1110 D, 1213; Resp. Ex. 1199 A, 1138 A-E)

A smaller area in this section was affected by port prices at these cities at the times shown in legend.

SOUTH CAROLINA AREA

NOTE D: Shows maximum effect of arbitraries based on Charleston, S. C., Wilmington, N. C., Savannah, Ga., and Jacksonville, Fla., and covers the period from July, 1929 to May 15, 1931. (Com. Ex. 1110 Y, 1213)

A smaller area in this section was affected by port prices at these cities at the times shown in legend.

FLORIDA AND ALABAMA AREAS

NOTE F: Shows maximum effect of arbitraries based on Jacksonville, Miami, Pensacola, Panama City and Port St. Joe, Fla., Savannah, Ga. and Mobile, Ala., and covers the period from Dec. 8, 1936 to July, 1937. (Com. Ex. 1110 C, 1213, 3011-2 M-N, 2 O, 2 W, 415 (573-574)

A smaller area in this section was affected by port prices at these cities at the times shown in legend.

The map on page 562 (No. II-I) shows the areas and points east of the Pacific Coast shown by the evidence to have had "arbitrary" or "special" prices at one time or another during the period covered by the complaint. The map does not show the many points referred to in 2, below, where minimum or other arbitrary freight applications are used in cities and other metropolitan areas.

2. Flat or Zone Prices in Metropolitan Areas

As already noted from Affleck's testimony, *supra*, there are zones of equal prices throughout a particular area notwithstanding variations in freight rates from points of shipment to destinations within the area.[1] The evidence is that such zones exist because it is necessary to give the same price (and terms) to all dealers in the same city or town and to all dealers who are in competition with each other whether located in the same city or town or not, so that such customers will be in a position to compete with each other.[2] This point was made by Blaine S. Smith as Presi-

[1] (R) Tr. 34833-36; *supra*, pp. 557-559.

[2] Cronkite, Vice President, Universal Atlas (C) Tr. 13524-25.
Warren, F. B., Vice President, Bessemer (R) Tr. 32093.
McCracken, Dealer (R) Tr. 36769.
Koch, Vice President, Lone Star (R) Tr. 33150.
Lucas, Vice President, Petoskey (R) Tr. 38754.
Coogan, Vice President, Alpha (R) Tr. 23057, 23061-62, 23138-39, 23175.
Bates, J. E., Sales Manager, Federal (R) Tr. 30774-75.
Brobston, President, Hercules (C) Tr. 10601-02.
Ackerman, Vice President, Lawrence (R) Tr. 31230.
Bowen, Vice President, Lehigh (R) Tr. 26824-25.
Robeson, Vice President, Nazareth (R) Tr. 28071.
Porter, President, North American (R) Tr. 33870;
Resp. Ex. 2401: Memo 12/22/36, Harte, North American to Lawler.
Penn-Dixie: Com. Ex. 971-21 A: Letter, 8/20/35, B. S. Smith to Dr. Clark.
Affleck, President, Universal Atlas (R) Tr. 34834.

dent of Penn Dixie to Dr. Clark in connection with the subject of trucking in a letter dated August 20, 1935.[3] Smith emphasized that:

> "Cement being a standardized product, must be sold to all customers of the same class at the same place at the same time at the same or substantially the same price."

He continued that it is "absolutely necessary" that this

> "be maintained by the manufacturers to prevent the disruption of the markets of their customers and to prevent the dissatisfaction and criticism by their customers which would otherwise result. Even in cases where the railroad freight rates vary to two destinations close together geographically which serve the same territory it is usually found necessary to make some adjustment thru the medium of establishing the lower of the two prices at both of the points. Otherwise all of the business in the general community could be done by the customer having the lowest freight rate and consequently the lowest price.
>
> Much dissatisfaction and criticism of the manufacturer among his customers is caused even if a single sale, although relatively small, is made by one of the manufacturer's customers who has a slight price advantage over his other customers in the same general location."

The same point was made by Harte, Vice President of North American in a memorandum to his Baltimore office in 1936 when North American initiated reduced prices at Baltimore and in the surrounding area.[4] Noting that North American's new prices were figured on a port price at Baltimore plus a certain cost per mile from Baltimore to points in the surrounding area, Harte said:

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[3] Com. Ex. 971-20 Z-21 A.

[4] Resp. Ex. 2401: Memo 12/22/36, Harte, North American to Lawler.

"In cases where prices figured on this mileage basis seemed to discriminate against a dealer or dealers at any particular destination, such minor adjustments were made as seemed necessary to correct the local situation."

The zone price in metropolitan areas was explained by Koch, Vice President of Lone Star, as follows:

"In certain metropolitan areas, Lone Star Cement Corporation has what is generally called a blanket price. It usually corresponds to but sometimes extends beyond the switching zone in the city. Lone Star Cement Corporation has initiated such blanket price at certain points such as Dallas, Houston, Texas; New Orleans, Louisiana; and Norfolk, Virginia. It has found blanket prices by competitors in effect at Birmingham, Alabama; New York City, Long Island and Westchester County, and Boston, Mass.; also at Chicago, St. Louis and Kansas City.

The reason for such a blanket price is that the area where it is found may be said to be common selling territory for every dealer in it, in that the dealers, although they have warehouses at different points in the area, are all selling throughout that area in competition with each other. The blanket price serves to give them the same price in order to permit them to compete on equal terms with the other dealers selling Lone Star's brand and competitor's brands in that area."[5]

Robeson, President of Nazareth, testified that:

"* * * If there were two dealers in a town our price to the two dealers, we would naturally make the same: that would be our policy, to see that they were both equally treated alike."[6]

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[5] (R) Tr. 33150.

[6] (R) Tr. 28071.

The establishment of zones of prices for dealers competing with each other in the same city or town is shown to have been used for more than twenty years.[7]

The necessity for respondents to maintain goodwill of their dealers and the importance of the dealer-customer is developed in Part XII, G, *infra*.

Bowen, Vice President of Lehigh, testified that New York was one of the "metropolitan areas" where prices had no relation to base figures.[8] He described the price situation in four boroughs of New York City as follows:

> "A. We quote all dealers in the New York Metropolitan market the same price, irrespective of the fact that our freight rates to the destinations of some of the dealers are higher than to the destinations of others.
>
> Q. How did you come to do that, Mr. Bowen? A. It has been the result of competition over a long period of time.
>
> Q. Well, you say it is the result of competition. Can you give us what company initiated the policy of charging the same price in this territory? A. Oh, the situation has continued for so many years that I don't know who began it. It is a logical outcome of the somewhat unique geographical and freight rate situation that exists in that New York Metropolitan area.
>
> Q. Have there been any changes in that practice? A. Yes, I recall that about 12 years ago one of our competitors undertook a change in that situation, the movement taking the form of quotations by that manufacturer which named prices to the customers located at the inland delivery points in the New York market, those taking higher freight rates, prices that were 6 cents per pound higher than he quoted to

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[7] Coogan, Vice President, Alpha (R) Tr. 23142-43; Resp. Ex. 456: Memo 12/4/16, Coogan, Secretary, Alpha to Sales Department.
Alexander, President, Missouri (R) Tr. 37382.

[8] (R) Tr. 26823.

the dealers located at the waterfront destinations which take the lower freight rate.

These quotations were followed by most manufacturers in the market, particularly because both prices represented a reduction from the price previously quoted, but the manufacturers who met the quotations did so very slowly, and some of them didn't issue quotations at all. The result was that tremendous pressure was exerted by the dealers on the manufacturer who had established those prices, and the pressure was apparently sufficiently great enough to cause him to recede from his position, which he did within a very few weeks by quoting the lower of the two prices to all the destinations in the market.

That is the only case of the kind I recall in recent years that confirmed the opinion that we have had for many years that in any market of that kind where there are a great number of dealers in direct competition with each other the eventual outcome is bound to be one price to all those dealers, and, so far as I know, it is always a price that reflects the lowest of the freight rates.

Q. You say 'about 12 years ago.' That would be about 1927. You say one of your competitors endeavored to change the situation in New York by quoting different prices in that territory. What company was that? A. It was in 1927, and the company was the Atlas Portland Cement Company.

Q. Are the prices the same today in the New York market? A. Yes, our price today in the New York market is the same to all buyers." (Tr. 26824-26)

The method by which prices in Metropolitan New York have been determined, however, has varied. At different times it has been made up: on the basis of the Hudson base plus an average water transportation cost to the city,[9] on the basis of the Lehigh Valley base plus freight,[10] and as

[9] Com. Ex. 958-4 Y-4 Z: Letter, dated March 17, 1936, B. S. Smith to Prof. Burns.

[10] Com. Ex. 958-4 Z, *supra*.

a special depressed price to meet competition from imported cement.[11] In summary the data as to these prices is as follows:

A commission exhibit, listing prices at New York from January 1925 to July 1933, shows special prices ranging from 8¢ to 29¢ below the sum of the Lehigh Valley base plus freight.[12] During this period average water transportation costs from Hudson, N. Y. were used in establishing these prices.[13]

In August 1932 Lehigh issued quotations which reflected an increase of 29¢ per barrel at the Hudson base. The advance, however, was not applied to New York City and Long Island where the former price remained in effect, 29¢ below the Lehigh Valley base plus freight.[14] In December 1932 Lone Star increased the New York price by 29¢ per barrel, equal to the Lehigh Valley base plus freight which increase was followed by competitors.[15]

In December 1936 Lehigh initiated a depressed price at New York 33¢ below the former price.[16] The Lehigh Price Announcement shows zoning as follows:[17]

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[11] Com. Ex. 958-4 Y-4 Z.

[12] Com. Ex. 971-26 J.

[13] Com. Ex. 958-4 Y.

[14] Resp. Ex. 2502 A-B: Price Memo, Universal Atlas, dated Aug. 2, 1932; Com. Ex. 971-26 J, *supra*.

[15] Com. Ex. 3329: Price Memo, Universal Atlas, dated Dec. 27, 1932.

[16] Bowen, Vice President, Lehigh (R) Tr. 26967, 26970.
Com. Ex. 551 X: Lehigh's Price List, 12/8/36.
Com. Ex. 1099 R, W: Bids to Navy Department for Brooklyn, N. Y.

[17] Com. Ex. 551 X, *supra*; this list is accompanied by a map showing the four zones referred to therein.

	Price Per Barrel Including Cloth Sacks
"Stations in Manhattan, Bronx, Brooklyn and Queens (except Queens points included in Long Island Zones 1 and 2)	$2.10
Stations on Staten Island	2.16
Stations in Long Island — Zone 1	2.15
Stations in Long Island — Zone 2	2.20
Stations in Long Island — Zone 3	2.25
Stations in Long Island — Zone 4	2.35
Stations in Hudson, Essex and Union Counties, New Jersey	2.20"

"Stations in New York, Connecticut and New Jersey adjacent to New York" were then listed on a series of separate sheets listing a number of destinations.[18]

Special prices covering an area of concentrated population in metropolitan districts outside of Metropolitan New York have included Boston,[19] Washington, D. C.,[20] Baltimore,[21] Chicago,[22] Milwaukee,[23] Buffalo,[24] Birming-

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[18] Com. Ex. 551 Y-2 B.

[19] Bowen, Vice President, Lehigh (R) Tr. 26823.

[20] Bowen, id.
Neylan, Asst. General Sales Manager, Lone Star (C) Tr. 6297-98.
Dawson, Vice President, Medusa (R) Tr. 40589-90.

[21] Bowen, *supra*.
Dawson, *supra*.

[22] Cronkrite, Vice President, Universal Atlas (C) Tr. 13522-24.
Affleck, President, Universal Atlas (R) Tr. 34833-34.
Koch, Vice President, Lone Star (R) Tr. 33150.

[23] Dawson, *supra*.

[24] Bates, J. E., Sales Manager, Federal (R) Tr. 30774-75.

ham,[25] Greater St. Louis,[26] and a number of other points.[27]

3. Flat Prices in Mill Switching Areas

Flat prices often appear in the switching area of a mill.[1] How and why this occurs was stated by Coogan of Alpha in explaining the situation where the company nets more than its base, as follows:

> "Well, on an individual shipment we may not go that low, we may net more from our basing mills, but on the whole the net return at any of our basing mills, is less than the base that we set at that mill. Now, I might explain how we get a little bit more. We have at our basing mills, and we use the minimum line haul rate as our minimum figure in arriving at our destination price plus the base rate. In

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[25] Coogan, Vice President, Alpha (R) Tr. 23138-39, 23142-43.

[26] Coogan, *supra.*
Alexander, President, Missouri (R) Tr. 37382.
Koch, Vice President, Lone Star (R) Tr. 33150.

[27] Cincinnati: Dawson, *supra.*
Cleveland: Warren, F. B., Vice President, Bessemer (R) Tr. 32535-36, 32093, 32519-20, 32515-16.
Affleck, President, Universal Atlas (R) Tr. 34833-34.
Dawson, *supra.*
Detroit: Lucas, Vice President, Petoskey (R) Tr. 38820, 38746.
Kansas City: Koch, *supra*, Tr. 33150; Brooke, Vice President, Monarch (R) Tr. 42436; Alexander, *supra*, Tr. 37428.
Oklahoma City: Stone, Vice President, Universal Atlas (R) Tr. 35285-86; Resp. Ex. 2500: Universal Atlas Price Memo No. 6, 6/7/32.
Brooke, *supra*, Tr. 42383.
Pittsburgh: Bowen, Vice President, Lehigh (R) Tr. 27139.
Affleck, *supra*, Tr. 34833-34.
Houston:)
Dallas:) Koch, *supra*, Tr. 33150.
New Orleans:)
Norfolk:)

[1] See details, *infra.*

other words, we have at some mills a switching territory where there are various switching rates. Now, immediately you get outside of the switching territory, you run into a short haul rate, or line haul rate, rather, so if we tried to set our destination prices on the various switching charges, we would have to feather those prices out to a considerable degree, out in the territory where the line haul is effective, so it seems to us just plain common sense that instead of the lower we use the higher and get as much money for it as we possibly can. So, in those cases, we use the line haul rate, and where delivery may be made on a switching charge, we net a little more than the figure which we have set as the base of our mill.[2]

• • •

Q. Mr. Coogan, when we recessed, we were discussing minimum line haul rates and basing rates, in general. Would you mind referring to one of your mills and tell us how it operates there? A. Well, at Birmingham, the minimum line haul rate to a point located outside of the Birmingham switching district, amounts to fifteen cents per barrel, whereas the cost for delivering the car within the switching limits of Birmingham may run from something like six dollars or seven dollars a car up to fifteen dollars or twenty dollars a car. Now, in arriving at the price that we quote in Birmingham, we take the base at our mill, plus the minimum line haul rate, which is fifteen cents per barrel, which we quote as a minimum in Birmingham.

Q. That is the per barrel unit rate and not the carload? A. Fifteen cents is the unit rate per barrel.[3]

• • •

Q. I am not sure that what the record shows is clear, but I think that the Examiner's point was, why do you do this; you have not told us why you do it. You have told us what you have done, but you

[2] (R) Tr. 23054.

[3] (R) Tr. 23056.

have not told us why you have done so. Please do that. A. Our customers located in that switching zone, and those located immediately outside of that switching zone, are in competition with each other. We must, as a matter of necessity, give them both the same price so that instead of taking the minimum we take the minimum line haul rate and apply that so as to give the same price to all of our customers in the same territory.'"[4]

Bowen, Vice President of Lehigh, testified on this subject as follows:

"Q. • • • You, I think, told us that Lehigh quoted prices around some of its mills which do not have a direct relation to the base figure at the mill and to freight. How do you arrive at those prices? A. Practically all our Lehigh mills are at locations where there is no cement market,—or work, when we began shipping Lehigh cement from the Buffalo plant in 1927,—and when in the early part of 1928 we decided to figure prices from that mill that were based on that mill,—we found a new problem in trying to determine what prices we should quote to our customers in the City of Buffalo.

Most of our deliveries in Buffalo are made on switching rates, and those rates vary according to the number of railroads that participate in the movement. If we figure our prices on the individual rates we would have a number of different prices to different customers in the City of Buffalo, and we knew from long experience that that would not work.

There were also a number of customers located immediately outside the switching limits, and in direct competition with the dealers just inside the limits, and we knew that our prices would have to be such as to recognize that fact.

After studying the problem carefully, what we decided to do was to quote the dealers located inside the switching limits the same prices as we quoted to the first dealers immediately outside the switching limits, particularly because that action

[4] (R) Tr. 23057.

gave all of the dealers in the City of Buffalo 20 cents lower prices than they had received from us before.

In 1929, when we began shipping from the Cleveland grinding plant, and used that plant as a basing point, we found exactly the same sort of situation existing in the Cleveland market, and handled it in exactly the same way.

Q. Well, with respect to the areas in the vicinity of the competing base mills, how do you quote prices in those areas? A. Where we find in such areas that competitors are quoting prices, and as we learn of those prices, we meet them, or retire from the field.'"[5]

On cross examination Bowen was asked whether "all points within switching areas" use a "minimum line haul rate instead of the varying switching charges" and replied:

"A. No. I found a variety of practice in that respect, and, of course, where the plants are competitive plants we met the prices as we find them irrespective of their apparent competition.

Q. You meet them on the basis of minimum line-haul rate in the switching districts, don't you? A. I said in some areas they indicate the use of minimum line-haul rate, but in others they don't."[6]

The same condition exists in the several areas where there are groups of mills such as the Lehigh Valley and the Gas Belt. D. S. Browder of Penn-Dixie explained the pricing found in these areas in a letter to Dr. Burns in March 1935 as follows:

"1. The Lehigh Valley District Group consisting of 27 mills covers an area approximately 40 miles in length and 10 miles in width. For distances of 50 miles or less the rate from each mill in this group is figured on its own individual mileage, and these rates vary in amounts from 5¢ per 100 pounds or 19¢ per barrel for distances of 10 miles and less to 9¢

[5] (R) Tr. 26822-23.

[6] (R) Tr. 27139.

per 100 pounds or 34¢ per barrel for distances of 50 miles and over 40 miles. For all destinations located over 50 miles from the various mills the rates are grouped and the same identical rate applies from all mills in the group. These group rates are arrived at by using the distance from Northampton, Pa., which is approximately the center of the group. A minimum freight rate of 19¢ per barrel is observed in making delivered prices in this district.

2. The Kansas Gas Belt Group covers an area of approximately 107 miles in length and 20 miles in width. For destinations less than 70 miles from the mills the rates vary and are made by using the individual distance from the mill to the destination. To destinations in excess of 70 miles from the mill all of the mills are grouped and the rates are the same from each mill in the group to the destination. Where the route to the destination is thru Kansas City, Missouri, the average distance from all of the mills in the group are used by the railroads in arriving at the rate. To destinations where the movement is not thru Kansas City, Mo., the distance from Chanute, Kansas is used by the railroads in arriving at the rates, Chanute being approximately in the center of the group. The lowest freight rate applicable in this territory for distances of 15 miles and less is 7¢ per 100 pounds or 27¢ per barrel. The rate for 70 miles is 10¢ per 100 pounds or 38¢ per barrel.

3. The Hudson River Group is somewhat complicated in that to destinations in New England rates from all points in the group are the same and based on the average distance from each of the mills to the destination except for distances 60 miles or less from the various mills. To these destinations which are 60 miles or less the rate is based on the actual mileage from each individual mill. The rates in this territory vary from 5¢ per 100 pounds or 19¢ per barrel for 5 miles and less to 10¢ per 100 pounds or 38¢ per barrel for 60 miles. The minimum freight rate used in basing prices from these mills is 19¢ per barrel.

To destinations other than in New England the rates are not grouped and the mileage from each individual mill to the various destinations are used in establishing the various rates. The scale of rates to destinations other than in New England varies from 5¢ per 100 pounds or 19¢ per barrel for 5 miles and less to 9½¢ per 100 pounds or 36¢ per barrel for 60 miles.

4. The Kansas City Group consisting only of Sugar Creek and Bonner Springs, carries identical rates to all points which are made on the distance from Kansas City, Missouri to such destinations. Both of the points in this group are base points. The minimum freight rate used in basing prices from these mills is 25¢ per barrel. The freight rates shown above from the Kansas Gas Belt Group also apply from this group.

5. The St. Louis Group consisting only of Continental and Prospect Hill, carries identical rates to all points, which are made on the distance from St. Louis, Missouri. Both mills in this group are base mills. The minimum freight rate used in basing prices from these mills is 27¢ per barrel. The freight rates shown above from the Kansas Gas Belt Group also apply from this group to destinations in Missouri. The rates to destinations in Illinois are 6½¢ per 100 pounds or 25¢ per barrel for distances of 15 miles or less and 8½¢ per 100 pounds or 32¢ per barrel for 70 miles.

6. The Birmingham Group under the rate making rule carries identical rates to all points of destination in excess of 100 miles from the mills which are figured on the distance from Birmingham, Alabama. To destinations 100 miles and less from the various mills the rate from each individual mill is figured on its own mileage to the destination. However, in this case the mills are so close together that in most instances the rates even figured on the individual mileage from the various mills are identical. There are, however, some few exceptions.

The rates for this group vary from 4¢ per 100 pounds or 15¢ per barrel for 5 miles and less to 11½¢ per

100 pounds or 44¢ per barrel for 100 miles. The minimum charge used in arriving at prices from this group is 15¢ per barrel.'"[7]

Lists of bases in evidence show the use of a minimum line haul or other such factor used in the area of a number of base mills.[8]

4. Port Bases

The importation of foreign cement has given rise to varying price phenomena at the ports where foreign cement enters the country and sometimes also in the areas adjacent to such ports. Thus, in an effort to meet the competitive situation caused by an increasing influx of foreign cement into the South Atlantic Coast ports, at times prices at those ports have been considerably lower than they would be if they reflected a mill base at some mill plus the freight and in order to be competitive with the prices of foreign cement moving inland from those ports, the port prices were used as bases to which the rail freight was added for determining prices at inland points reached by foreign cement.[1] Conditions in the areas where this occurred favored this pattern since there were commodity rail rates on cement from the ports to inland destinations.[2]

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[7] Com. Ex. 971-4 V-4 X.

[8] See *e.g.* Resp. Ex. 457.
Com. Exs. 1952, 2366, 1440 A.
And see Answers to F.T.C. Questionnaire cited at pp. 340-341, *infra*, fns. 11-14.

[1] Reiter, Vice President, Universal Atlas (C) Tr. 3739, 4491.
Coogan, Vice President, Alpha (R) Tr. 23847, 23850-51.
Bowen, Vice President, Lehigh (R) Tr. 26953-54.
Dannelly, Vice President, National (R) Tr. 39593, 39679.
Browder, Traffic Manager, Penn-Dixie (R) Tr. 38299-300.

[2] Coogan, *supra*, Tr. 23851.

In late 1936 Alpha initiated new low prices in the Southeast using certain port cities as bases. Coogan testified to this as follows:

> "Q. * * * Has your company ever initiated any depressed prices in seaboard markets? A. Yes, shortly after this we found foreign competition was bothering us materially from our Birmingham mill and particularly at Mobile, Pensacola, and Panama City, so that the Alpha Company put in at those places a base figure which they used, plus the freight rates from those ports, to interior points, and quoted those prices.
>
> Q. When was that, Mr. Coogan,—when did you establish these bases? A. It was, I think, December 27 or 28; it was the latter part of December in 1936.
>
> Q. Well, now, again did you discuss with any of your competitors your intention of establishing these base prices at Pensacola and Mobile and Panama City, before you put them into effect? A. I did not.
>
> Q. After you put it in, did any of your competitors ask you why you put it in, or discuss it with you? A. No. I do not remember that any of them did. Now, of course, you must remember that the base figure that we put in at that mill, plus the freight rates from the Ports would not cover a very large territory." (Tr. 23847-48)

Asked how Alpha established these "port bases" Coogan testified:

> "A. We simply sent out new quotations showing our destination prices. That automatically established the base there, because we used the base figure in arriving at those prices.
>
> Q. You say you 'sent out new quotations.' Did they have any statement on them to the effect that they were establishing a base or that they were base prices? A. Oh, no. We never show that on a quotation.
>
> Q. Did you send any notice of any kind to the

Cement Institute that you were putting in a base at that point? A. No, sir, I did not.

* * *

Q. Well, I have reference to before you did it, when you were sending out notices. A. No, sir.

Q. Did you tell anyone what you were going to do? A. No, sir. We did not." (Tr. 23850-52)

Browder, Penn-Dixie Traffic Manager, testified that his company established "price bases" at Charleston, South Carolina, Savannah, Georgia and Jacksonville, Florida in October 1936 and at Wilmington, North Carolina and Brunswick, Georgia in February 1937.[3] Asked the circumstances, he testified:

"Q. You have said, Mr. Browder, that these bases at non-producing points were established by your company because of the imported cement situation. Will you explain just how the establishment of bases at these coast points you have mentioned assisted in competing against the imported cement? A. Well, at the particular time that those bases were established there was quite a large highway program coming out in Georgia involving, as I recall it now, about 230,000 barrels of cement, and practically all of that work was along the coastal area, and there was a threat of foreign cement being used in all of that highway work, and to offset that and to hold that business, we put in these price bases.

Trial Examiner Norwood: Now, were those bases equal to the price of the foreign cement at the port?

The Witness: Not exactly, Judge. No, sir. It was a litle bit higher, but we felt that we could control the sale with a slightly higher price than was in effect on foreign cement due to many factors that are involved there.

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[3] (R) Tr. 38299-300.

By Mr. Brick:

Q. Why were those particular points selected, Mr. Browder? A. Well, they were all in proximity to the jobs in question. Some of the jobs were in the southern part of the State. It would be affected by the foreign cement coming through Jacksonville, some in the central part it would be affected through Savannah. And, as I recall it, too, there was some additional work in South Carolina, but it was not as much as there was in Georgia, so it was put in at those three points first.

Q. Now, were those points points to which foreign cement was shipped from abroad? A. That is correct.

Q. And what relation did your price at those points have to points going inland? A. The prices at the ports were considerably lower than they were at the interior points just back from the port. In other words, as you went inland from the ports your prices were increasing, until they finally reached a point in the interior near a mill where they started decreasing as they went towards the mill.

Q. Was there any difference in the price relationship as you have explained it in connection with these non-producing ports on the one hand and a producing point where there is a mill with a price base on the other hand? A. No. We figured that there was a supply of cement at these ports, which was the foreign cement. It was giving us the same competition in the same way as domestic cement mills would give us, and we met that competition in this way." (Tr. 38301-03)

These "port bases" were not first introduced in recent years. Coogan, Vice President of Alpha, testified that Mobile, Ala. and Pensacola and Panama City, Florida were used as bases many years ago.[4] Bowen, Vice President of Lehigh, testified to the use of port bases before 1910.[5]

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[4] (R) Tr. 23850-51, See also 23147, 24532; Resp. Ex. 455: List of basing points used by Alpha from 1903 to 1938.

[5] (R) Tr. 26954.

McGovern, Sales Manager of Hermitage, testified that as a salesman travelling Florida in 1916 he encountered prices based on Jacksonville, Florida.[6]

Browder of Penn-Dixie testified that his company had attempted to eliminate the southern port bases in the latter part of 1937 "by mailing out broadcast quotations which did not take those bases into effect." He continued:

> "However all of our competitors did not meet those quotations and continued the use of the lower prices based on the ports, and we had to withdraw those quotations and go back to the lower price."[7]

He testified that finally someone took them out in 1938.[8]

Alpha discontinued the port bases which it had initiated sometime in 1938, according to Coogan, because:

> "* * * the matter of imported cement did not seem to be as important in those ports as it had been at the time we put in the bases, and it was reducing the return which we were getting from our Birmingham mill. And we did not want to quote on those bases any longer than was absolutely necessary. And we felt it was worth a trial to take them out and see how it worked. So, we discontinued using them about 1938, some time.
>
> Q. Do you know, or do you recall whether or not your competitors followed that change in price? A. I think that most of our competitors followed that change. I know, by this time, they all have followed it, but I am not sure as to just what time these various competitors of ours applied the prices which we were quoting. In the field affected by those points.
>
> Q. Well, now, to save time in asking you several questions, let me ask you, did you follow the same practice in discontinuing these same bases as you did

[6] (R) Tr. 36342.

[7] (R) Tr. 38300-01.

[8] (R) Tr. 38301.

when you put them in? A. Precisely. We just sent out new prices.

* * *

Q. Now, as to that, Mr. Coogan, did you give your competitors any advance notice or subsequent notice about this matter that you had discontinued these bases?

* * *

A. I gave my competitors or nobody else any advance notice. As I have already stated that, subsequent to the change, if they asked me what had been done I would tell them what I had done.

Q. Yes. I understand. What was your experience, when those new quotations went out, with regard to the other companies?. Were they quoting on a lower price at the same time that you were quoting on a higher price? A. Yes. They were quoting on the lower price until such time as they changed their quotations." (Tr. 23852-55)

5. Arbitrary Prices at North Atlantic Port Areas

A considerable amount of foreign cement has always entered the United States through New York and Boston and other seaboard areas where no commodity rates from the ports inland existed. To meet this condition there have frequently been patterns of depressed prices along the northeast coast, principally in the areas around New York, Boston,[1] the Maine, Virginia and Maryland shore, Delaware and New Jersey among others.[2]

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[1] Neylan, Asst. General Sales Manager, Lone Star (C) Tr. 6042-43, 6532-34.
Browder, Traffic Manager, Penn-Dixie (R) Tr. 38487-88.
Reiter, Vice President, Universal Atlas (C) Tr. 3938.
Com. Ex. 971-26 i-J: Lists of Arbitrary Prices for Boston and New York 3/4/36.

[2] Neylan, *supra*, Tr. 6532-34.
Bowen, Vice President, Lehigh (R) Tr. 27138.
Ackerman, Sales Manager, Lawrence (C) Tr. 7348-49.
And see Map #II-I, p. 562, *supra*.

Because of the absence of any commodity rates on cement out of the northern ports, these port prices were not used as basing points in the same manner as southern ports where commodity rates on cement were available.[3] Imported cement is shipped from these ports, however, into New England, parts of New York and New Jersey and other inland points and therefore domestic manufacturers have adjusted their prices accordingly, by working them outward ("feathering out") in relation to the price at the port areas,[4] using the estimated cost of trucking[5] or other available transportation[6] as the basis for determining their prices in the adjacent areas. This general pattern of "feathering out" has existed in the metropolitan New York market for more than 25 years,[7] and such adjusted prices have been used throughout New England off and on since 1926.[8]

Summarizing this condition, Blaine S. Smith, testifying before the Senate Interstate Commerce Committee, as President of Penn-Dixie, said:

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[3] Reiter, Vice President, Universal Atlas (C) Tr. 3739-41.
Bowen, Vice President, Lehigh (R) Tr. 26955.
See Sec. 2, *supra*.

[4] Bowen, *supra*, Tr. 26828.
Coogan, Vice President, Alpha (R) Tr. 24528-29.
Com. Ex. 551 N-2 B: Lehigh arbitrary price lists.
Com. Ex. 1184: Map of special prices, Westchester County, N. Y.

[5] Bowen, *supra*, Tr. 26955.
Coogan, *supra*, Tr. 26828-29.
Neylan, Asst. General Sales Manager, Lone Star (C) Tr. 6298-99.

[6] Bowen, *supra*, Tr. 26828 (Long Island Railroad).
Resp. Ex. 2401 (1/2 to 1c. per mile): Memo 12/22/36, Harte, Vice President, North American to Lawler.

[7] Bowen, *supra*, Tr. 26829.

[8] Neylan, *supra*, Tr. 6042-43, 6532-34.
Ackerman, Sales Manager, Lawrence (C) Tr. 8210-11.

"There is considerable freight absorption which is not the result of cross hauling. One important illustration is the situation presented by the competition of foreign cement at the ports and in adjacent territory. To meet this competition of foreign cement, it is often necessary to establish considerably lower prices in the port area than would be made by adding freight rates to the basing price of the nearest mill. In addition to the low price at the port, it is often necessary to scale this price back into the interior in order to meet the competition of foreign cement that is trucked back into these interior points. This, of course, forms a considerable area of low-priced territory around the ports. Shipments made from even the closest mill produce prices at the mill considerably lower than its base price. Since the port areas are generally large consuming markets, they account for a large proportion of the prices at the mill which are lower than the base price, yet there is no cross hauling involved."[9]

The situation in the principal markets affected is summarized below.

a. Boston

Lone Star initiated a "reduced price" at Boston in November 1926, after the competition of imported cement there became "very acute" and Lone Star was "repeatedly approached by the dealers for action."[1] Competitors followed this price.[2]

Bowen, Vice President of Lehigh, testified that in the Spring of 1929 Lehigh "figured prices on Boston using it as a basing point in order to meet the competition of foreign cement * * * moving quite strongly into the interior

[9] Com. Ex. 2878 D-E.

[1] Koch, Vice President, Lone Star (R) Tr. 32894-95.

[2] Id.; also (R) Tr. 33050.

territory around Boston."[3] Asked how Lehigh determined its prices in the surrounding areas, Bowen testified:

> "A. The imported cement was moving into that surrounding area by truck. There were no commodity rates from Boston to inland points; commodity rail rates,—so we made a survey of the trucking costs from Boston and computed our prices for the inland points by adding to our Boston price the estimated cost of trucking to the destination, as the survey had developed it.
>
> Q. Did these prices, do you know, bring a higher or lower return at your mill? A. It brought us a considerably lower return than the prices theretofore made." (Tr. 26955)

Bowen testified that these prices were met by competitors "to whatever extent they remained in the market" but that his observation was that some of Lehigh competitors withdrew from the market.[4] Lehigh sold this way in Boston "from time to time with various modifications of the method until July 1938."[5]

Reiter, Vice President, Universal Atlas, did not consider Boston a "base" and testified that there are no basing points to meet the competition of imported cement "in the north" because there are no commodity freight rates on cement.[6]

John W. Wray, proprietor of Waldo Bros. & Co., one of the largest building material dealers in the Boston area, testified regarding the Boston arbitrary prices as follows:

> "Q. Have you found that the price delivered to the dealer in Boston is lower than the points farther west in Massachusetts? A. There is an arbitrary

[3] (R) Tr. 26955.

[4] (R) Tr. 26955-56.

[5] Id.

[6] (C) Tr. 8789-41.

zone, an arbitrary mill base, I think they refer to it, to meet foreign cement, and cement is shipped, and has been for some time from domestic plants in to Metropolitan Boston at lower prices than cement shipped to places like Worcester and Springfield where the actual freight rate is lower from the Hudson River mills.

Q. How much difference have you known to exist between the price of Domestic cement delivered at Springfield, say, and at Boston? A. Again, I would not be able to tell you accurately. I would have to refer back to the actual figures, but I think it is about fifty or sixty cents.

Q. A barrel? A. Yes, a barrel.

Q. And how much lower freight rate would you say there is at Springfield, than from the Hudson Valley? A. This again is a guess. It is perhaps twenty or thirty cents lower.'"[7]

James F. Twamley, Sales Manager of Coplay, described the price conditions which his company met in Boston in 1935 as follows:

"Q. Reference is made in the same exhibit to the question of diversions coming up in view of the difference in the price between Boston and interior points. Was that difference in price the difference between the so-called arbitrary price in Boston and the price at interior points arrived at by figuring, combining the freight rate and the base price? (Tr. 6903)

• • •

The Witness: • • • I will say in reply to that, Mr. Wooden, that while I cannot say definitely what the price scale was around Boston at the time this letter was written, there were a number of special prices outside of Boston. The Boston price I think was the lowest, and then as you proceeded westward, the price gradually increased, so that perhaps thirty miles from Boston, or forty miles, you might find a price that was not

[7] (C) Tr. 7842.

based on a mill price—which is part of your question as I recall it, therefore I cannot say that that would apply; I do not know. (Tr. 6904-05)

* * *

Q. Well, you used them, as I understand it, and adopted those arbitrary prices; and I would like to know whether you did it blindly, or whether you—— A. (Interrupting) We did it blindly, because in every case we found the prices and we met them. We had no rhyme nor reason in respect to the amount that we charged. We just met the price we found was being quoted at certain destinations. If you wish that opinion, I am ready to give it to you.

Q. I would like to know, based on your experience in the matter, if you saw any system or rhyme or reason in the relationship between the prices at the different points in the arbitrary zones? A. I think that they started at Tidewater at the port with the lowest price, and as you proceeded inland the prices were increased to approximately equal the cost of transportation.

Q. By what method? A. By truck from alongside the dock wherever the storage might have been." (Tr. 6905-06)

A tabulation of prices at Boston from January 1927 to October 1933 furnished to Dr. Burns in 1936 shows a high of $2.12 per barrel in 1933 and a low of $1.58 in May 1932, and further that the Boston price fluctuated from 6¢ to 56¢ per barrel below the sum of the base at Hudson, N. Y. plus freight to Boston.[8]

b. New York

The arbitrary prices in Greater New York proper have been referred to in Section 2, *supra*. These prices were "feathered out" as there shown into Westchester, Long Island, Connecticut and New Jersey.[1]

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[8] Com. Ex. 971-26 i: List of arbitrary prices for Boston 3/4/36.

[1] See pp. 567-570, *supra*.

In 1935 a special Brooklyn truck delivery price was initiated by North American in order to compete with imported cement being trucked in that area from the piers. This is discussed in detail in Part XVI, C, 3, *infra*.

c. Baltimore

A port price was initiated by Universal Atlas in 1926 and this remained until 1929.[1] In December, 1936 North American initiated a price reduction at Baltimore, feathered out into the surrounding area in order to meet the competition of imported cement there.[2] The depressed Baltimore price was still in existence in 1940 although Mr. Porter testified:

> "* * * but we have run into difficulties at a few points around Baltimore where one dealer would complain that he was put at a disadvantage compared to some other dealers, and we have always tried to adjust these things to keep our competitors handy."[3]

North American furnished lists of its depressed prices to competitors at their request. This evidence has already been set out in Sec. C, pp. 238-241, *supra*.

6. State and County-Wide Uniform Prices

a. Uniform Price in State of Ohio

For a few months in early 1931 there was a flat price in existence for the entire State of Ohio. This price was

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[1] Porter, President, North American (R) Tr. 33865.
Com. Ex. 971-26 H: List of arbitrary prices for Baltimore 3/4/36.

[2] Porter, *supra*, Tr. 33794, 33865-68, 33870.
Resp. Ex. 2401: Memo 12/22/36, Harte, Vice President, North American to Lawler.

[3] Id., Tr. 33870.

established by Alpha under circumstances testified to by its Vice President Coogan, as follows:

"In the State of Ohio, we have a mill located in southern Ohio. We are in direct competition at that point with mills located at Zanesville and Dayton and Portsmouth. We tried the experiment, I think it was early in 1931, we had been meeting what we thought was all kinds of competition, we could not find out where it was or what it was. It was spotty. It depended upon samples you would find one in one place and some place another so we decided to try the experiment of quoting a flat price all over the State of Ohio.

As I remember it, we put that price in in 1931. The price which we quoted at that time was $1.75 per barrel in cotton bags delivered to any point in the State of Ohio.

I think a few weeks later we found that still we were not meeting competition and we reduced it to $1.55 in cotton bags. Then, I think we reduced it still further to $1.50 and we maintained it at that price until about the latter part of May, as I remember it, May 31, 1931.

Our experiment had not had the desired result, we did not get any more business from it, and there still seemed to be competition which we were not able to meet.

Q. What did you do then, Mr. Coogan? A. Well, we decided that we would try the effect, inasmuch as we were in direct competition with the mills at the points that I have named, that we would put in a low base, and that we would apply that base from the mills located at Zanesville and Dayton, Ohio, because in checking up the information we had it was our opinion that the price which we set at that time was about the price that they were using in quoting on some business which had come up in the neighborhood.

Therefore, in May, May 31, 1931, we put out a price based ninety-six cents stripped at Ironton, Zanesville, and Dayton.[1] (Tr. 23290-91)

• • •

Q. Before you put the flat price in Ohio, did you discuss it with any of your competitors? A. It was not discussed with any of our competitors. I can state that very positively because at that time I happened to be the only active executive in our office and that step was taken when there was only one other officer there, and while it was discussed with him, he took no active part in it and there certainly was no conversation with anybody outside of our own office." (Tr. 23297)

Mr. Coogan was cross examined on this as follows:

"Q. Showing you Commission's Exhibit 971-30 G which is your letter to Arthur Burns, June 4, 1935, describing this 1931 situation, • • •

Q. What did you mean by your statement in this letter that when you reduced the price to $1.45 in cloth on April 1, 1931, eliminated the dealer service payment of 5 cents a barrel, the price was further reduced to $1.40 per barrel,—what did you mean by the statement immediately following that, that this did not help the competitive situation. A. I mean it did not get us any larger portion of the business emanating from that particular territory.

Q. You would not agree that you were trying to help the competitive situation by teaching these price cutters a lesson? A. No, I told you that we were trying to meet what prices we found them quoting in that field.

Q. And you will not agree that you were trying to teach the price cutters a lesson? A. I will not. (Tr. 24481-82)

• • •

[1] The evidence relating to the bases at the Ohio points mentioned, including the purposes and effects of these incidents, is digested in Sec. D, pp. 521-530, *supra*.

Q. Well, was that a price war that you had in 1931? A. Certainly resembled it very closely, all during 1931.

Q. Did you have what you would call a price war since 1931? A. No general price war. We have had spotty prices, but I wouldn't say any general price war." (Tr. 24491-92)

b. Uniform Price in State of Michigan

On January 2, 1937, Huron initiated a flat price of $2.10 in cloth at all destinations in the Lower Peninsular of Michigan. This price was in effect until April, 1938, except for three counties where the flat price remained until February, 1940.[1]

Rooney, Vice President of Huron, explained the circumstances as follows:

"Q. Mr. Rooney, going back to the time when the so-called Michigan plan was put into effect, that was about when? A. In January, 1937.

Q. Can you tell us for how long a period of time prior to that that had been under discussion? A. Well, I had been thinking of some such plan as applicable to Michigan for six months to ten months prior to the time it was put into effect.

Q. Had there been discussions going on about it? A. Well, I can recall no discussions, excepting that in conversations with Mr. Crapo I had told him what my thoughts were in the matter, and he rather agreed with me, that it might be a feasible thing to do.

Q. Did any particular discussion precipitate that decision, just about the beginning of the year 1937? A. Yes, sir.

Q. What was that? A. Well, I would have to go back a little, probably. There had been apparently some difficulty between the Wabash and the Aetna Company with respect to some marketing activities, and as a result of that the Wabash Company had put a base on the Bay City plant of the Aetna Company, reducing the price in the area. That had remained

[1] Meyers, Traffic Manager, Huron (R) Tr. 33410-11.

in effect for quite a considerable time, and about the first of December—in or about—1936, the Aetna Company came out with quotations increasing this price back to its former level. That was what they thought would be desirable, apparently, but before these quotations had been in the hands of the dealers more than a day or two, the Wabash came out with quotations, bringing it back down to their idea of what the level should be.

Well, that caused quite a state of confusion. We did not know what the level was. It got to a point where it was rather indefinite. We did not know what the price was, and what kind of competition we had to meet; so I thought that would be a pretty good idea to wash the whole thing out, and I came out with a flat price for the Lower Peninsula of the State of Michigan, which I had determined in advance would level the whole thing off and wash out some of the difficulty.

Q. You say 'wash out'. What do you mean? A. Wash out that difficulty between the Aetna Company and the Wabash Company.

Q. In other words, there would be a new price lower than what either one of them would be? A. That is right.

Q. Is that what you mean when you say 'wash out'? A. Yes.

* * * * *

Trial Examiner Norwood: Do you mean that reduces the prices all over the State to the level of that Bay City basis?

The Witness: No. The Bay City base, or any other base, as far as the Lower Peninsula of Michigan was concerned, became inoperative at that time. The flat price that was put out throughout the State was not determined from any base, your Honor.

By Mr. Smith:

Q. That remained in effect until when? A. I think it was in April, 1938.

Q. What induced you to abandon it then and go back to the former system? A. Well, I had had

plenty of opportunity to analyze it during the period, and I had come to determine that it was not a sound economic method of marketing.

Q. Had it increased your tonnage any? A. No."[2]

On cross-examination by Commission Counsel Rooney was questioned as follows:

"Q. As I understand it, that flat price for the whole Lower Peninsula was effective only in that area; is that right? A. That is right.

Q. Why did you stop right at the Michigan State line? A. That is where our trouble was.

Q. Where? A. In Michigan.

Q. Well, did the trouble, itself, stop at the Michigan State line? A. That has been our experience in the past, that it very often stops at the line.

Q. Why should there be any trouble that stops right at the State line and was corrected by a remedy applied that stopped only at the State line? Why should there be anything like that A. I don't know. We may be a peculiar class of people in Michigan, but, nevertheless, that is where we do seem to have a lot of differences of opinion among ourselves in the cement industry, and I am rather inclined to think that that could be shown by the fact that the price of cement in Michigan is lower than it is in any other place in the United States—unfortunately.[3]

• • •

Q. Did you make any other attempts to solve this difficulty reflected by the Aetna and Wabash marketing troubles before you put in this flat price? A. No, sir; I did not act as peace maker.

Q. Was there any similar difficulty between the Aetna and Wabash after you withdrew your flat price in April, 1938? A. Not that I know of."[4]

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[2] (R) Tr. 33667-70.

[3] (R) Tr. 33699-700.

[4] (R) Tr. 33701-02.

Aetna, Wolverine and Medusa produced evidence showing that they learned of this flat price through their salesmen and customers.[5]

c. Allegheny County, Pa.

The City of Pittsburgh and the whole of Allegheny County, in which it is located has been on a uniform price since March 1937.[1] According to the price file of West Penn 63 destinations in this area carried "arbitrary" prices.[2]

The only comprehensive testimony regarding the Allegheny County prices was given by F. McKee, President of West Penn, who was cross examined as follows:

> "Q. Can you tell me, Mr. McKee, whether the $2 price which you said was arbitrary in certain counties in Pennsylvania was above or below the destination price figured on the lowest combination of basing point plus freight? A. It was below.
>
> Q. And do you recall how much below? A. No; I do not recall because that would vary according to the particular destination in the county.
>
> Q. What county was it? A. Allegheny County.
>
> Q. Did the arbitrary cover just one county? A. No, there were some aribitraries at some border destinations, in counties adjoining Allegheny.
>
> Q. Is there any large city in Allegheny County? A. In Allegheny County?
>
> Q. Yes. A. Pittsburgh.

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[5] Aetna: Calvin, President (R) Tr. 30038.
Resp. Exs. 1996-1999: Salesmen's reports with quotations attached.
Medusa: Dawson, Vice President (R) Tr. 40049-50.
Wolverine: Nelson, J. L., Vice President (R) Tr. 35910.

[1] McKee, Vice President, West Penn (R) Tr. 27728-29, 27870-71.
Dawson, *supra*, Tr. 40253.
Letzkus, Sales Manager, Pittsburgh (R) Tr. 37692, 37699.

[2] Resp. Exs. 1109 B, 1420 A-L.

Q. Is that the only arbitrary in your sales territory? A. No, there are arbitraries in Baltimore and Washington.

Q. Is Pittsburgh and surrounding area still an arbitrary? A. Yes.

Q. Is the extent of the arbitrary zone equal to the metropolitan area of Pittsburgh and the switching limits? A. The extent of the arbitrary zone is larger than the City of Pittsburgh. I can't recall definitely what the switching limits are, but I believe that the arbitrary area is larger than the switching limits of Pittsburgh. Now, by 'switching limits'——

Q. Well, then it isn't the switching limits that determine the boundaries; is that right? A. Well, I can't tell what determine the bounderies.

Q. You don't know what determines the boundaries of that arbitrary? A. No.

Q. Is that arbitrary still—— A. Still——

Q. —prevailing? A. —in effect when I left Pittsburgh last.

Q. How long? When did it go into effect, do you recall? A. I don't remember; it has been in several years.

Q. It says 'effective 11-15-37' in this exhibit. A. Yes.

Q. Is that about right? A. Yes, its—that's our office book—that's the date, as nearly as we could find out.

Q. What explanation have you to offer for the establishment of the arbitrary at Pittsburgh? A. Well, I don't know; I am not a mind reader.

Q. You have no explanation? A. I have none.

Q. How long did it take you to ascertain the extent of that arbitrary from the time that you first found a quotation to base point formula at Pittsburgh? A. The extent of the—of what we termed the flat price of $2 in Alleghany County, we found very quickly, because a large number of dealers at different destinations in the county called us and we checked others immediately, but it is very distinct in my mind that we did not learn of all of the points on what would be termed the feathered portion of the territory for some time, and would pick them up one at a time.

Q. About how long would you say, Mr. McKee? A. Oh, over a period of some days, how many I don't remember; it is two years ago.

Q. Are there still some points in dispute? A. Well, all that I can say is that we have found no evidence of that as indicated by inability to sell at the prices that we have been quoting, but there may be sales that were missing that I am not aware of the cause.

Q. Does any company—any one of your competitors—put out a price list to its salesmen showing the extent of that arbitrary zone and listing the prices at the various suburban points? A. I don't know.

Q. You have never seen such a list? A. I don't think so.

Q. You would have seen it if it had come to your company, would you? A. Oh, yes, I think I would.

Q. And you do not recall ever having seen such a list? A. I don't recall that.

Q. Are some of the suburban points within that arbitrary zone now on a price basis above the lowest combination of base point price plus freight? A. Well, now, what do you mean by suburban towns?

Q. Well, what I want to find out, Mr. McKee, is whether or not that $2 flat price represents more or less of an average of the prices that would have prevailed had there not been an arbitrary,—assuming, of course, that the base point—— A. I am quite satisfied that the $2 represents a reduction at all points in Allegheny County, over the previous quoted prices, with this exception: I believe that there are a few points served by the Union Railroad on which the freight rate—well, I am not sufficiently clear about that—I can say, though, very distinctly, that the $2 flat price represented a reduction from the previous prices being quoted in Allegheny County, I believe.

Q. Has there been some reduction in controlling basis since then? A. No.

Q. How did you, in pricing your product around these arbitrary zones, determine where the feathering should stop? A. Well, we do not determine that. We discover the situation. I do not know how that was determined.

Trial Examiner Norwood: Isn't there any common factor there?

The Witness: Do you mean, your Honor, as to the reasons that might suggest themselves?

Trial Examiner Norwood: Yes, yes.

The Witness: Well, I could see this, that if you had a $2 price at a destination in Allegheny County on the border of another county, and that a mile or two beyond in the other county there was a considerably higher price, the dealer at the point in the other county might be under some handicap by reason of the abrupt change in price in relation to the distance involved.

By Mr. Paulson:

Q. Well, we have had considerable testimony here, Mr. McKee, tending in the direction of proving that manufacturers must accommodate dealers who are situated adjacent to each other in order not to put them to disadvantage one against the other. A. Yes.

Q. That accounts for the feathering. I was just wondering—I wanted to find out from your experience whether or not geography of the country and the locations of the towns provides you a suitable stopping place in that feathering process, or whether you have to draw the line arbitrarily somewhere. A. Well, of course, as I answered you before, we do not do the feathering process. I am just giving you a guess as to a reason that might have influenced those who first so quoted.

Q. Well, then, tell me in your experience have you found that there are still many dealers around the edge of metropolitan area who are at a disadvantage as against those nearer in to the metropolitan area, for instance? A. I have heard no such complaint for at least, oh, a long period past.

Q. Am I right in thinking that there is bound to be a disadvantage to one dealer as against another dealer notwithstanding the feathering out? A. I do not believe that the present situation is placing a hardship on any dealer or he would continue his complaints. What, as I recall, not very distinctly,

there was on the part of a few dealers a little discussion of the matter at the time that we ran into—but, of course, when any price changes, either up or down, dealers are bound to be dissatisfied. If it goes up, they claim that it will affect them adversely, and if it goes down it will cause them a loss in their inventory, so that there is nothing but little more than the usual discussion that takes place." (Tr. 27870-76).

d. Ohio and Kentucky Counties

In addition to the uniform price all over the State of Ohio which existed for three months in 1931 (see pp. 587-590), there was also an arbitrary price in Cuyahoga and Hamilton Counties, at other periods.[1] These prices arose in part from the necessity of keeping the Cleveland (Cuyahoga County) and Cincinnati (Hamilton County) dealers on an equal price basis in their respective marketing area.[2]

The Kentucky counties of Kenton, Campbell and Boone, are across the river from Hamilton County, Ohio and arbitraries existed there during the same period.[3]

Referring to Cleveland, F. B. Warren, Vice President of Bessemer testified:

"A. • • • —Cleveland doesn't figure back to any freight that I am familiar with. The Cleveland metropolitan area, that is added to that base, it doesn't add up.

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[1] See Map #II-I, p. 562, *supra*.
See also:
Letzkus, Sales Manager, Pittsburgh (R) Tr. 37692.
Dawson, Vice President, Medusa (R) Tr. 40536-37.
Horner, President, Kosmos (R) Tr. 36810.
Com. Ex. 970-13 P: Medusa answer to Burns-Clark Questionnaire.

[2] See Sec. 2, *supra*, pp. 563, 573.

[3] Warren, G. E., Vice President, Southwestern (R) Tr. 29323.
Resp. Ex. 1109 (page 2): Lehigh's list of bases.

Q. That is, when you take the actual freight from Cleveland to the points, it doesn't figure up? A. I am talking about Cleveland Metropolitan area now, Mr. MacIntyre.

Q. Yes, that is what I am talking about. It does not figure out? A. No.

Q. Isn't it a fact that there is an arbitrary rather than actual freight that is involved in the Metropolitan Cleveland area? A. Well, you see, Mr. MacIntyre, we accept the price that's there, and sell at that price.

Q. Well, don't you know that there is an arbitrary involved there, Mr. Warren, as a freight factor?

• • •

A. Well, if you will define arbitrary as a price that does not reflect base plus freight, I will accept your statement.[4]

• • •

Q. Well, isn't it a fact that all of the delivered price quotations in the Metropolitan Cleveland district bear a constant relationship to this $1.50 Cleveland base figure? A. The prices in that area are the same.

Q. Yes. A. That is one price in that whole area.[5]

• • •

A. (Witness figures on pad) In Cleveland the price in paper is $1.94, and 15 cents off for sacks, $1.79. You go back to $1.50, less a dime, leaves you 29, as the constant factor.

Q. So there is a constant freight factor or transportation factor of 29 cents that applies as an addition to the Cleveland base figure of $1.50 in making up all of the delivered price quotations for the Metropolitan District of Cleveland? A. I think you may call that a transportation factor, yes.

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[4] (R) Tr. 32515-16.

[5] (R) Tr. 32519.

Q. And it is constant, irrespective of whether the actual charge is constant; is that correct? A. Well, now, you see—I don't know about the charge, there.

Q. Well, I say, irrespective of the fact as to whether the actual charge is constant for a haul of 5 miles or 25 miles, the factor is constant? A. Well, this factor is constant.

Q. Yes. What area is embraced in this metropolitan district that we have been talking about? A. Well, that's Cleveland and suburbs—I think all of Cleveland and suburbs.

Q. It runs along the lake for a distance of almost 50 miles, doesn't it—from east to west? A. I would hardly think it would be that long, Mr. MacIntyre.

Q. Well, how long is it? A. Well, I am not just sure; I don't know.[6]

* * *

The Witness: We quote prices to compete with the prices that we find. Now, in the Cleveland Metropolitan Area they don't seem to add back to base plus freight; that is, on the same comparison that they add back to base plus freight as you get outside that area.

Trial Examiner Norwood: Yes.

By Mr. MacIntyre:

Q. But you analyze them in the same way, do you not, Mr. Warren, for the purpose of determining whether or not that they figure back to a constant base figure? A. Oh, I think we do that, yes."[7]

Meyers of Huron testified that Cleveland was more or less an arbitrary price for the entire trucking area.[8]

There is no other connected evidence regarding the other areas mentioned in this section.

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[6] (R) Tr. 32520-21.

[7] (R) Tr. 32535-36.

[8] (R) Tr. 33488-89.

F. Price Changes.

(By the Findings and by concessions of counsel in the proceedings before this Court, the significance of price changes has been limited to the question of price rigidity. The Commission found that there has been no direct or systematic exchange of price information among respondents and that price changes have come to the attention of the respective respondents through information picked up in the field through customers.[1] For the purpose of dispelling any inference of collusion with respect to price increases petitioners moved to adduce certain evidence with respect to eight specific changes in price during the period from 1930 to 1938, as to all of which evidence had been excluded by the Trial Examiner.[2] Respondents are not pressing their motion with respect to this evidence in view of the concession by Commission counsel in its response to the motion.)[3]

The Commission has found:

> "As heretofore pointed out, in 1932 and 1933, at a time when consumption of cement amounted to less than 30 percent of capacity and had been declining rapidly during the economic depression then existing, respondents made numerous and substantial increases in their prices for cement. Many of the base prices established during the series of price advances which ended early in 1933 were still in effect, unchanged, in 1938. In the case of other bases, with but a few exceptions, only minor readjustments have been made since early in 1933 and prices have remained unchanged over varying numbers of years.

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[1] Fdgs., Par. 9 (e). See also the Commission's Answer in Opposition to Petitioner's Motion for Leave to Adduce Additional Evidence, R. 16669.

[2] Motion to Adduce Additional Evidence, R. 16573-75.

[3] Commission's Answer in Opposition to Petitioners' Motion for Leave to Adduce Additional Evidence, R. 16669.

Cement prices have shown a high degree of rigidity.'"[4]

This finding is accepted.

The only composite evidence respecting prices at basing points during the period from 1932 to the date of the complaint is contained in Com. Ex. 1185, consisting of a list of price bases produced by Lone Star at the request of Commission counsel as of June 8, 1938, and Resp. Ex. 2487, a tabulation of changes in price bases at the plants of Universal Atlas from 1920 to 1938. These exhibits do not refer to the places and areas of arbitrary or special prices which have been in existence at various times during the period in question. The evidence as to such prices is referred to in Part II, E, *supra*, and particularly on Chart No. II-I, at page 562, *supra*.

Respondents attempted to show that the apparent stability of base prices does not necessarily reflect a corresponding rigidity in prices at destinations. They offered in evidence a tabulation of all cement price changes at 14 representative cities over the period 1926 to 1938.[5] This was rejected by the Trial Examiner and respondents have moved to adduce it.[6]

In addition, respondents offered in evidence a tabulation comparing the wholesale price of cement and of other commodities including building materials for the period 1913 to 1938, together with certain graphs illustrating the comparison.[7] This tabulation shows that cement prices are generally as variable as or more variable than those of other commodities. This was excluded by the Trial Examiner and respondents have moved to adduce it.[8]

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[4] Fdgs., Par. 23 (e).

[5] Resp. Ex. 2526 for identification.

[6] Motion for Leave to Adduce Additional Evidence, R. 16597-98.

[7] Resp. Exs. 2527-2529 for identification.

[8] Motion for Leave to Adduce Additional Evidence, R. 16598.

The evidence in the record shows that there has been no country-wide level of prices at any time and that prices in different parts of the country have differed in varying degrees from time to time.[9]

The evidence shows that after a price increase becomes effective, respondents are unable to make sales at the increased price for at least a month thereafter and that it is often several months before a company realizes the increased prices on all of its sales.[10] Why this occurs was

[9] Resp. Exs. 754, 763-768, 774, 783, 785-794, 796, 819, 830, 836, 859, 902-906, 915-919, 930-938, 944-946, 953-954, 968-973, 977, 979, 981, 1110, 1112 A-B, 1384, 1641 A-B, 1698, 1743 A-B, 2086, 2219-2238, 2281, 2378, 2553, 2710, 2909 D-O, 3379 B-C, 3621 A-H, 3622 A-W, 3645 A-Z17.

[10] Googan, Vice President, Alpha (R) Tr. 23358.
Brobston, President, Hercules (R) Tr. 26123.
Bowen, Vice President, Lehigh (R) Tr. 26776.
McKee, Vice President, West Penn (R) Tr. 27718-19.
Ackerman, Vice President, Lawrence (R) Tr. 31262-66.
Warren, F. B., Vice President, Bessemer (R) Tr. 32112-13.
Porter, President, North American (R) Tr. 33933-35.
Nelson, J. L., Vice President, Wolverine (R) Tr. 35901-02, 35914.
Elcock, Vice President, Southern States (R) Tr. 37514-15.
Letzkus, Sales Manager, Pittsburgh (R) Tr. 37703-04.
Browder, Traffic Manager, Penn-Dixie (R) Tr. 38229-30 O.P.
Lucas, Vice President, Petoskey (R) Tr. 38751-52.
Pearson, Secretary-Treasurer, Cumberland (R) Tr. 39856.
Dawson, Vice President, Medusa (R) Tr. 40062.
Moore, R. W., Vice President, Dewey (R) Tr. 47061.
Resp. Ex. 2403 D: Statement dated Dec. 1933 showing 48.5% of North American's contract business at former low price.
Resp. Exs. 3545-3546: Invoice prices of Medusa's shipments into Cleveland, Ohio Jan. 1936 - Sept. 1937.
Resp. Ex. 3548: Chart of Resp. Exs. 3545-3546.
Resp. Ex. 3554: Invoice Price of Peerless' shipments into Detroit, Michigan, 1932-1939.
Resp. Exs. 3556-3557: Invoice Price of Diamond's shipment into Cleveland, Ohio Jan. 1936 - Sept. 1937.
Resp. Exs. 3560-3561: Chart of Resp. Ex. 3554.

explained briefly by McGovern, Sales Manager of Hermitage, as follows:

> "Q. With respect to price advances, are you able to state from your experience how soon you usually receive orders under the new price after you have advanced your price?
>
> * * *
>
> A. Oh, I would say from sixty to ninety days.
>
> Q. And are you able to estimate at all as to the length of time it takes you to realize, fully realize, the increased prices? A. Why, I would say it would probably take four to five months before you fully realized them.
>
> Q. Will you explain why that is? A. Well, when there is an advance, of course the contracts you have on your books you have to ship at the old price, and every dealer covers up for everything he can, puts everything in the warehouse and has to get rid of that before we are able to sell him any at the new price." (Tr. 36146, 36149-50)

1. The 1932 Price Increases

This is the only price increase as to which the Commission makes any factual findings.[1]

As already shown, prices were carried to extremely low levels during the "price war" which began in about 1929 and carried through the middle of 1932.[2]

Coogan, Vice President of Alpha, testified that the Company was sustaining very large losses during 1931.[3]

Fellows, Western Sales Manager of Alpha, referred to the period preceding the 1932 price increases as two "disastrous" years.[4]

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[1] Findings, Par. 10 (f).

[2] See pp. 256-260, 495, *supra*; also Com. Ex. 1117 A-B and Resp. Ex. 2487.

[3] (R) Tr. 24591-92.

[4] (R) Tr. 25627.

F.T.C. Investigator Royal testified that the President of Hawkeye had told him that the Company showed a loss of $521,000 for 1931 and 1932,[5] and that Stone, Vice President of Universal Atlas told him prices existing up to 1932 were ruination prices.[6]

Hogan, President of Lone Star, testified that by the middle of 1932 prices were so low there wasn't anything left to cut.[7]

Colburn, Vice President of Marquette, testified that in 1932 Marquette was almost bankrupt.[8]

Alexander, President of Missouri, testified that in 1932 the Company was desperate—losing money.[9]

The acting director of the Department of Public Works and Buildings of the State of Illinois, reporting on bids received by the state in 1933, said:

> "* * * it was hardly expected that the remarkably low prices for 1932, or even for 1931, could prevail in 1933, because it is a very significant fact that the prices for these two years were the result of a competitive price-cutting campaign due to an inactive market, which could hardly be expected to continue without serious loss to the cement companies."[10]

As late as May 19, 1932 there was a 25¢ reduction of prices in the area of the La Salle, Illinois base.[11]

During the price war period several companies resigned from the Portland Cement Association. Dewey wrote to

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[5] (C) Tr. 19526-27.

[6] (C) Tr. 12942.

[7] (R) Tr. 34651.

[8] (R) Tr. 39966-67.

[9] (R) Tr. 37304.

[10] Resp. Ex. 61 A-C.

[11] Meyers, Traffic Manager, Huron (R) Tr. 33394.
Com. Ex. 1121 A: Lone Star Sales Memorandum.
Com. Ex. 1114: Lone Star Tabulation of Base Price.

the Portland Cement Association in February, 1931 declaring that it would pay dues for its Oklahoma plant only through February, since it had information that Oklahoma, Monarch, Consolidated, and Missouri, intended to discontinue paying dues,[12] but wrote again on April 28, 1931 that it was discontinuing all dues after May, 1931 because "we must take every means possible to increase our monetary resources."[13] The record, however, shows only a resignation for Dewey applicable to its Oklahoma plant.[14]

Hawkeye resigned in February, 1931 stating that "cement prices are at such a level that we just cannot afford the expense of membership."[15]

Missouri discontinued paying dues for its Sugar Creek plant in April 1931 because major competitors in that area were not supporting the Association, and Missouri accordingly felt that it should not continue to support it. Missouri resigned for its Prospect Hill plant in May or June 1931 for the same reason.[16] Universal Atlas, Penn-Dixie and Lone Star gave notice of withdrawal of special dues payments at about the same time, effective as of June 30.[17] Marquette was not a member in 1931.[18]

April, 1931 was the period when so-called "punitive" bases were established at the Ash Grove mill at Louisville, Nebraska and the Nebraska mill at Superior, Nebraska.[19] Sunderland, President of Ash Grove, referred to April

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[12] Com. Ex. 2973.

[13] Com. Ex. 2978.

[14] Com. Exs. 2973-2975.

[15] Com. Ex. 2989.

[16] Alexander, President (R) Tr. 37246-47.
Com. Ex. 2999.

[17] Com. Ex. 2992.

[18] Com. Ex. 2971.

[19] See pp. 489, 501, *supra*.

1931 as a "cement market debacle" and in a letter to Boettcher, President of Ideal, proposed that the "five or six interests which observed the published market at the recent Oklahoma bidding should get together as soon as possible and organize for mutual protection and to map out a constructive program"; and wanted to arrange a conference at Kansas City.[20] Two months later, June 5, 1931, Boettcher wrote Rader, Vice President of Lehigh that there had been "a pleasant meeting in Kansas City and everything went off very nicely"; he could not see that "we accomplished much", but he had agreed to join the Association under certain conditions "which could easily be complied with", viz.: taking the base off his Ada plant.[21]

The correspondence during this period is set out in connection with "punitive" bases in Section D-7, *supra*, pp. 504 *et seq.* and 511-513. It appears that hope was felt for a solution at the Portland Cement Association meeting in New York in May.[22] It was after that meeting, however, that Dewey resigned on May 31st, to "conserve its resources",[23] and Missouri's resignation as already noted was effective as of June 1st.[24] Thereafter Boettcher referred to a meeting early in June at Kansas City at which a committee of 12, headed by Norcross, Vice President of Missouri, was appointed to "see various people" but for what purpose or with what result, does not appear.[25] It was later (in August) that Capen, Vice President of Dewey, at Davenport, Iowa, advised the President of his company at Kansas City that "Marquette was making deals of a dime off"

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[20] Com. Ex. 2245.

[21] Com. Ex. 2249.

[22] Com. Exs. 2246, 2980, 3000, 2242.

[23] Com. Ex. 2978.

[24] Com. Ex. 2999.

[25] Com. Ex. 2249.

to practically all line yard companies and Tyler advised him not to change Dewey's practice "awaiting the results of the meeting in Chicago" on August 20th.[26] Tyler predicted a further break in prices if nothing was accomplished at that meeting.[27] On August 13th Sunderland and Boettcher, at a meeting preceding the August 20th meeting, referred to and thought they had left the matter "in excellent shape since it will allow Hiram [Norcross, Chairman of the Committee of Twelve] to develop the phases of the situation which he was delegated to try and get straightened out." The point of the meeting, according to Sunderland, was that they would not be paying special dues to the Portland Cement Association "until the principle is recognized that each company has the exclusive right to determine its own maximum selling (base) price at its own mill."[28]

The August 20 meeting occurred but Tyler's report to Capen was "disappointing" and little was accomplished. Capen guessed at the cause of the failure as follows:

> "My guess is that certain influential ones in the industry felt that it was not the time to start something along the lines of stabilizing the industry • • • Perhaps another year with prices like they are will have the effect of a sobering influence on many of the companies."[29]

The period between the August 20, 1931 meeting and December, 1931 seems to have been relatively quiescent.

A hopeful note, however, is suggested in September by Capen's (Dewey) note to Tyler requesting instructions for bidding on a State of Minnesota letting:

> "I am wondering if all of the companies bidding will bide alike. *If There Is No Contact* between

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[26] Com. Exs. 2184, 2185.

[27] Com. Ex. 2185.

[28] Com. Ex. 2257.

[29] Com. Ex. 2186: Letter, Capen to Tyler, President, Dewey, dated 8/22/31.

the other cement companies on the letting, shall we bid on the present market of $1.00 Mason City and $1.10 Duluth?" (Com. Ex. 2187)

Senior, President of Consolidated saw a "solution of our difficulties" in the outcome of a meeting in December 1931, regarding Incor cement. Cole, Traffic Manager, Medusa testified that Medusa was approached to consider taking out a license to produce high early strength cement under the Incor patent owned by International (Lone Star). This occurred around 1931 or 1932.[30] In attendance were Mehren (P.C.A.), Boettcher (Ideal), Hogan (Lone Star), John (M dusa), Kind (Hercules), Norcross (Missouri), Young (Lehigh), Struckman (Lone Star), Coogan (Alpha), Stone and Affleck (Universal Atlas), Schmutz (Bessemer), Smith (Penn-Dixie) and Coffin (Nazareth). There was, said Senior, "a good possibility" of the proposition being accepted "by the entire industry." He suggested regional meetings of executives and ventured that it "seems to be a solution of our difficulties."[31]

If the difficulties were price difficulties, however, they were not solved, because in December 1931 Missouri attempted to raise prices on its Sugar Creek mill, but the attempt was ineffective,[32] and in March, 1932 Blaine Smith (Penn-Dixie) writing to Kelly (North American) lamented that eight or nine million barrels of highway business in the Mississippi Valley had sold at prices of from 35¢ to 64¢ per barrel.[33]

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[30] Com. Ex. 2370 A-B: Letter, Senior to Ulrickson, Vice President, Trinity, dated 12/14/31.
(R) Tr. 40097-108.

[31] Id.

[32] Bowen, Vice President, Lehigh (R) Tr. 26920-21.

[33] Com. Ex. 1953.

On May 28, 1932, Lehigh issued quotations which had the effect of advancing its Iola base 25¢ per barrel to $1.25 stripped.[34]

Lehigh's Vice President Bowen testified that the number of price concessions had been greatly reduced following Missouri's unsuccessful attempt to advance prices in December, 1931, and that in May of 1932 Lehigh felt the time was ripe for a moderate increase in prices that would be followed.[35] This advance appears to have been met by Lehigh's competitors.[36]

In June, 1932 Missouri initiated increased prices in the area of its Sugar Creek mill and this increase was followed by Lone Star by advancing its Bonner Springs, Kansas base to an equal level immediately thereafter.[37] This advance was followed by Missouri's competitors.[38]

Alexander, President of Missouri, testified that the Company had lost about $1,000,000 during the period of low prices and that the increase was a desperate effort in the nature of a trial balloon. He testified further that the increase was made without consultation with competitors.[39]

On June 2, 1932 Nebraska increased its base at Superior, Nebraska by 30¢ per barrel,[40] and on June 7, 1932

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[34] Bowen, Vice President, Lehigh (R) Tr. 26919-23; Com. Ex. 2156: List of base price changes.

[35] (R) Tr. 26920-21.

[36] Com. Ex. 1121 C (Lone Star): Interoffice Memo 5/31/32, Neylan to Lehaney.
Com. Ex. 976-8 H (Monarch).
Resp. Ex. 2500 (Missouri and Trinity).

[37] Alexander, President, Missouri (R) Tr. 37304-05; Com. Ex. 967-16 Y.

[38] Resp. Ex. 2500; Alexander, *supra* (R) Tr. 37304-05.

[39] (R) Tr. 37294, 37304-05, 37375-76.

[40] Com. Ex. 976-5 F.

Ash Grove made a similar advance of its Nebraska base at Louisville, Nebraska.[41]

The low base prices of $1.25 cloth at La Salle, Illinois, continued unchanged through June and part of July, 1932.[42]

In July, 1932 Medusa, Petoskey, and Diamond presented resignations from the Portland Cement Association and Universal Atlas announced that it would no longer pay dues for several of its mills.[43]

The minutes of the Board of Directors of the P.C.A. for July 12, 1932 showed the following:

[Italicized part quoted in Fdgs. Par. Ten (f)]

"Joseph S. Young reported that he had, with Mr. Rader, interviewed T. G. Dickinson of the Marquette Cement Manufacturing Company, who agreed to take membership in the Association effective July 1.

President Mehren reported that he had been in communication by telephone with F. E. Tyler of the Dewey Portland Cement Company, H. L. Block of the Missouri Portland Cement Company, and C. B. Condon of the Hawkeye Portland Cement Company, who had agreed, provided the Marquette Manufacturing Company resumed membership, to do the same thing.

F. L. Stone reported that the Universal Atlas Company would withdraw for the time being its letter of May 13 regarding the payment of dues on the production of their Buffington, Indiana, Hannibal, Missouri, and Independence, Kansas, plants.

J. B. John advised that the Medusa Portland Cement Company would withdraw its resignation in view of the action outlined above."[44]

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[41] Com. Ex. 976-7 M.

[42] Com. Ex. 1117: Interoffice memos 7/13/32 and 7/21/32, Spring, Sales Manager, Lone Star to all representatives.
Com. Ex. 2387: Tabulation of base prices.

[43] Com. Ex. 3005 E.

[44] Com. Ex. 3005 E.

[Italicized part quoted in Fdgs. Par. Ten (f)]

On July 16, 1932 the manager of the Association telegraphed Missouri that *"Wecker of Marquette just telephoned that he was mailing membership application effective July 1."*[45]

Alexander, President, testified that Missouri rejoined the Portland Cement Association because a new plan had been developed for the operation of the Association, and on condition that certain major competitors would support the Association's activities in that area.[46]

Moore, Vice President of Dewey, testified that the company rejoined when it appeared that competitors were supporting the Association and its activities.[47]

Marquette issued quotations dated effective July 16, 1932 which reflected a 40¢ advance in the La Salle and Cape Girardeau bases at both of which points it operated mills.[48]

Colburn testified that when the Company increased its prices in 1932 (and in 1933) it was done only after Marquette had sold all the cement it could possibly manufacture in that year, not including its dealer business which was small.[49]

(Marquette subsequently increased its base at Cape Girardeau to $1.70 in March 1935 and to $1.75 per barrel in February 1936. On March 18, 1937 the Vice President and General Sales Manager of Universal Atlas wrote an interoffice memorandum stating among other things:

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[45] Com. Ex. 3003.

[46] (R) Tr. 37248; Resp. Ex. 2797 A-P.

[47] (R) Tr. 46770-71.

[48] Com. Exs. 2268-2273: Marquette quotations dated 7/16/32.
Com. Exs. 2274-2278: Universal Atlas interoffice memoranda dated 7/18/32.
Colburn, Vice President, Marquette (R) Tr. 40009.

[49] (R) Tr. 39049, 39997.

[Italicized part quoted in Fdgs. Par. Ten (f)]

"March 15 we found in the hands of the trade Marquette quotations dated March 15, effective March 20, quoting delivered prices, which after deduction of freight rate, indicate they have advanced their mill price at Cape Girardeau, Mo., *from $1.75 to $1.90 or some other figure sufficiently high to make this base price inactive in figuring delivered prices as against other base prices now in effect.*" (Com. Ex. 3340))

In replying to a Federal Trade Commission questionnaire, Marquette stated:

"* * * In our own case we came to the conclusion in July of 1932, after we had sold at the lowest prices in the history of our Company, all the cement we could produce and ship for that year, and had figured what our loss for the year would be, that we could not go on at this rate and continue in business. We accordingly decided that we would try in 1933 for a smaller volume of tonnage at a price which might permit us at least to break even after taking into account that costs on a smaller volume would necessarily be much higher. We accordingly raised our delivered prices to a level which we felt would accomplish this end and announced it to our trade."[50]

The evidence shows that the increases initiated by Marquette were followed by its competitors on various days between July 18 and July 22 although apparently the increase was not met by all competitors at all destinations.[51]

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[50] Resp. Ex. 85.

[51] Resp. Ex. 2501: Universal Atlas Price Memo.
Com. Ex. 2387: Dewey tabulation of Base Prices.
Resp. Ex. 859: Alpha Price Card.
Com. Ex. 1117: Lone Star list of Mill Bases.
Com. Ex. 1121 I: Lone Star Price Memo.
Meyers, Vice President and Traffic Manager, Huron (R) Tr. 33395.

Coogan, Vice President of Alpha, testified that Alpha was glad to adopt and follow the 40¢ advance at Cape Girardeau because the 85¢ base applicable to Cape Girardeau and Alpha, Missouri, was below Alpha's cost and the Company sustained very large losses every month in 1932.[52]

Bowen, Vice President of Lehigh, testified that Lehigh decided to meet Marquette's quotations because prices in the vicinity of La Salle had been among the lowest in the country and Lehigh felt that market conditions were such that an advance might generally be followed.[53]

Other increases which spread through the mid-west were the following: on July 18th Universal Atlas advanced the base at its Buffington mill 15¢ and on the following day, after picking up competitors' quotations indicating advances at neighboring base mills, it also advanced its Hannibal base 15¢ and the base at its Duluth mill was made operative by a reduction of 16¢.[54] According to quotations which Universal Atlas picked up in the field, Lehigh advanced its Mason City base 25¢ and its Mitchell, Indiana base 16¢ on July 18th.[55] On the same day Lone Star met the new Marquette quotations and advanced its Limedale, Indiana base.[56] Missouri appears to have advanced the base at its St. Louis mill on July 19th.[57]

In the east, Lehigh by an announcement dated July 28, 1932 simultaneously discontinued the loading of trucks at its Lehigh Valley mills and increased its delivered prices

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[52] (R) Tr. 24588-92; See also Fellows, Sales Manager, Alpha (R) Tr. 25626-27.

[53] (R) Tr. 26925-26.

[54] Resp. Ex. 2501.

[55] Com. Exs. 2287-2292, 2317, 975-3 X.

[56] Com. Ex. 1121 I.

[57] Alexander, President, Missouri (R) Tr. 37306.
Resp. Ex. 2501.

effective August 2, 1932 to reflect a 19¢ advance, in the Lehigh Valley base,[58] a 29¢ advance in the Alsen (Hudson-Catskill) base[59] and an advance in the Union Bridge, Md. base.[60]

The circumstances respecting this increase are referred to in Part VI, J, *supra*. There is no evidence connecting this action of Lehigh with the western increases. Bowen testified that these advances were in the nature of giving the industry an opportunity to restore prices in that territory to levels which would at least partly reduce losses and at the same time accord fair and honest treatment to dealers.[61]

In the southeast, quotations of Lone Star dated August 9, 1932 were found in the field on August 10th announcing delivered prices which reflected a 29¢ advance in the Birmingham base.[62] This advance appears to have been met by Alpha and Penn-Dixie on August 10th by the issuance of new quotations effective August 15th, increasing respectively, Penn-Dixie's Clinchfield base 44¢, its Richard City base 39¢ and Alpha's Ironton base 10¢ in territory south of the northern boundaries of North Carolina and Tennessee.[63] On the later date Universal Atlas also issued quotations effective immediately meeting the Birmingham advance and in turn increasing the base at its Leeds, Alabama mill 29¢.[64]

As to the various increases in 1932 Affleck, former President of Universal Atlas, testified that the cement companies saw the futility of trying to continue cutting prices

[58] Bowen, Vice President, Lehigh (R) Tr. 26858-59.

[59] Resp. Ex. 2502.

[60] Id.

[61] Bowen, *supra*, Tr. 26858-59, 26911-12.

[62] Resp. Ex. 2503; Com. Ex. 3327.

[63] Resp. Ex. 2503; Com. Ex. 970-16 F.

[64] Resp. Ex. 2503.

and had learned their lesson. He added that as the prices rose, the volume of business rose.[65]

In addition to the testimony of cement executives denying any agreements or understandings respecting the prices or pricing generally, or in other respects, there were also specific denials of any agreement respecting the 1932 increases.

Coogan, Vice President of Alpha, testified that no representative of Alpha attended any meeting or discussion among competitors relating to the increase in July 1932.[66] Alexander, Missouri President, testified that it had no consultation with any of its competitors regarding its new prices, either in June or in July.[67] Moore, Vice President of Dewey, testified that it had no agreement with competitors, nor any contact or communication with competitors prior to or at the time of the July increase, nor had any understanding with any competitor concerning prices in connection with its rejoining the P.C.A.[68] F.T.C. Investigator Royal testified that Condon, President of Hawkeye, knew of no understanding among cement manufacturers regarding the 1932 price increase.[69]

Affleck, former President of Universal Atlas, testified that there was no understanding or agreement regarding the 1932 increase with Marquette.[70]

Porter, President of North American and a director of the P.C.A., testified that the question of cement prices was never discussed at all at a P.C.A. meeting or meetings of the directors,[71] and there was other evidence to like effect.[72]

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[65] (R) Tr. 34930.
[66] (R) Tr. 24590.
[67] (R) Tr. 37305-06.
[68] (R) Tr. 47146-47.
[69] (C) Tr. 19546-47.
[70] (R) Tr. 34993.
[71] (R) Tr. 33986.
[72] See Part II, *supra*, pp. 164-166.